

*Fall 1995*

### Contingency and Coherence: The Interdependence of Realism and Formalism in Legal Theory

Hamish Stewart

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

---

#### Recommended Citation

Hamish Stewart, *Contingency and Coherence: The Interdependence of Realism and Formalism in Legal Theory*, 30 Val. U. L. Rev. 1 (1995).

Available at: <https://scholar.valpo.edu/vulr/vol30/iss1/1>

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at [scholar@valpo.edu](mailto:scholar@valpo.edu).



## Articles

### **CONTINGENCY AND COHERENCE: THE INTERDEPENDENCE OF REALISM AND FORMALISM IN LEGAL THEORY**

HAMISH STEWART\*

#### ABSTRACT

*This Article seeks to demonstrate that, despite their apparent antagonism, legal realism and legal formalism complement each other. Realism attempts to explain law as a vehicle for achieving purposes that are external to the law: legal doctrines are simply instruments for achieving independently desirable goals. Formalism, in contrast, seeks an explanation for legal doctrine that makes sense of the conceptual structure of the law without reference to external purposes. But the explanations of legal doctrine offered by the realist turn out to depend on conceiving of legal relationships in formal structures, while formalist explanations are empty without some reference to the human interests that inform realist analysis. This claim is defended through an examination of realist and formalist explanations of the doctrine of causation in tort law.*

---

\* Assistant Professor, Faculty of Law, University of Toronto, 78 Queen's Park, Toronto, Ontario M5S 2C5, Canada. B.A. 1983, University of Toronto; Ph.D. 1989, Harvard University; LL.B. 1992, University of Toronto. I am very grateful to David Dyzenhaus and Ernest Weinrib for reading and criticizing earlier versions of this article. I also thank, Patrick Macklem, Bruce Chapman, Robert Howse, and seminar participants at the University of Toronto and at the Court of Appeal for Ontario for their comments.

**TABLE OF CONTENTS**

<b>I. Introduction . . . . .</b>	<b>3</b>
<b>II. Posner and the Dependence of Realism on Formalism . . . . .</b>	<b>4</b>
<b>A. Posner's Realism . . . . .</b>	<b>4</b>
<b>B. Posner's Formalism . . . . .</b>	<b>6</b>
<b>III. Weinrib and the Dependence of Formalism on Realism . . . . .</b>	<b>13</b>
<b>A. Weinrib's Formalism . . . . .</b>	<b>13</b>
<b>B. Weinrib's Realism . . . . .</b>	<b>18</b>
<b>IV. The Example of Causation . . . . .</b>	<b>23</b>
<b>A. Posner's Account of Causation . . . . .</b>	<b>24</b>
<b>B. Weinrib's Account of Causation . . . . .</b>	<b>26</b>
<b>C. Causation is Not Only in the World . . . . .</b>	<b>27</b>
<b>D. Examples from Tort Law . . . . .</b>	<b>32</b>
<b>1. Remoteness . . . . .</b>	<b>32</b>
<b>2. Unidentified Tortfeasors . . . . .</b>	<b>39</b>
<b>3. Joint Tortfeasors . . . . .</b>	<b>41</b>
<b>4. Liability Despite Disproof of Traditional Cause . . . . .</b>	<b>43</b>
<b>V. Conclusion . . . . .</b>	<b>48</b>

## I. INTRODUCTION

A recurring theme in legal theory is the conflict between two approaches which I will call formalism and realism. Neither approach can be defined precisely or abstractly; each is best appreciated in the context of its analysis of particular legal doctrines. Nor does either approach have a unique or definitive practitioner or school. But each approach does have a central tendency that distinguishes it sharply from the other. Formalism is the tendency to understand law from within, that is, to seek an explanation for legal doctrine that makes sense of the conceptual structure of the law without reference to external purposes. The formalist tries to separate those features of legal doctrine that are necessary, that is, determined by the requirements of law itself, from those that are contingent, that is, determined by historically variable social, economic, and political factors. It is the necessary features that define law; the formalist thus rejects policy-based explanations of legal doctrines, preferring explanations that show how legal doctrines function as parts of a coherent, but non-instrumental, whole.

Realism is the tendency to understand law from without, that is, to explain law as a vehicle for achieving purposes that are external to the law. For the realist, law is, in a sense, "all policy" in that the conceptual structure of the law has no meaning and no necessity: legal doctrines are simply instruments for achieving independently desirable goals. The realist's explanation shows how legal doctrine functions to achieve these goals, and disclaims any interest in whether it is internally coherent. Thus, historically variable factors are not just permissible as, but are central to, explanation of legal doctrine. Realists welcome the contingency that formalists seek to control.

The argument of this paper is that, despite their antagonism, realism and formalism depend on each other. The antagonism of formalism and realism constitutes, in Balkin's useful phrase, a conceptual opposition rather than a logical contradiction, and can therefore be interpreted as a "nested opposition" of mutual dependence.<sup>1</sup> Formalist interpretations of law rely heavily on notions of coherence, but arguments about the coherence or incoherence of particular doctrines cannot even be made without the assistance of the external considerations characteristic of realism. Yet realist interpretations of the law, which seek to do without formalist coherence, tend to impose their own patterns of coherence on the relationships which are the subject matter of private law disputes. Without realism, formalism makes law an intricate but peculiarly

---

1. J.M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669 (1990) (book review). Balkin does not apply his interpretation of deconstruction to the opposition between formalism and realism, but his comments about critical legal studies, *id.* at 1687-89, are highly suggestive of the approach I propose.

unsatisfying game, responsive to no human interest. But every effort to embody a realist principle within law creates a body of law with formal characteristics. There is, at least in our legal system, no way to practice law without this interaction.

To show this dependence, I present Richard Posner as an exemplary realist and Ernest Weinrib as an exemplary formalist. I consider their competing explanations of the causation requirement in tort law, and show that each relies on the tendency that he seeks to avoid. Weinrib's formalist analysis of causation has virtually nothing to say without reference to the external purposes that his theory seems to exclude. On the other hand, Posner's attempt to explain the causation requirement purely as a device for promoting an externally desirable goal runs into ambiguities that cannot be resolved without resort to the techniques of the formalist.

## II. POSNER AND THE DEPENDENCE OF REALISM ON FORMALISM

### A. Posner's Realism

The term "realism," as a name for the general tendency in legal scholarship to regard law purely as an instrument for achieving independently desirable social ends, derives from the American legal realist movement of the early twentieth century. Karl Llewellyn, a leader of this movement, said in a typical formulation that realism has a "conception of law as a means to social ends and not as an end in itself . . . ."<sup>2</sup> Three propositions characteristic of American legal realism, and of its contemporary successors, have been usefully identified by Joseph William Singer. First, "[t]he realists argued that it is impossible to induce a unique set of legal rules from existing precedents."<sup>3</sup> Since it is logically possible to distinguish one case from any other case, judges cannot simply apply precedent in a neutral way, but must look at the ethical impact of their decisions. Thus, "the realists argued against formalistic, mechanical applications of rigid rules regardless of their social consequences."<sup>4</sup> Second, "the realists argued against conceptualism," proposing instead that "[c]oncepts can only be given meaning by reference to considerations of policy and morality."<sup>5</sup> Third, "the realists argued that judges should make law based on a thorough understanding of contemporary social reality," particularly since the

---

2. Karl N. Llewellyn, *Some Realism about Realism*, in JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 42, 55 (1962) (original emphasis).

3. Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 499 (1988) (book review).

4. *Id.* at 501; see also Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). I have here consolidated two characteristics that Singer keeps separate.

5. Singer, *supra* note 3, at 500.

application of precedent which formalists desire is impossible in any event.<sup>6</sup>

Legal realism is thus an instrumental approach to law that attends to the contemporary social effects of legal rules and distrusts conceptual reasoning about those rules. All forms of realism seek to make the law instrumental to some extrinsic goal, and the widespread, almost common sense, acceptance of this view means that in some sense “we really are all legal realists now.”<sup>7</sup> Perhaps the most striking feature of legal realism in all its guises is its anti-conceptualism. Because the realist is concerned only with the law as instrument, he or she tends to treat legal concepts not as independently significant structures, and certainly not as expressions of rights, but as masks for underlying moral principles, for substantive aspects of the good, or for pure operations of power by the judiciary.

Economic analysis of law is perhaps the most influential modern form of realism, and the work of Richard Posner, a leading economic analyst, illustrates realism’s characteristic instrumentalism and anti-conceptualism. Posner argues that “the common law is best (not perfectly) explained as a system for maximizing the wealth of society.”<sup>8</sup> This instrumentalism implies that adjudication is prospective rather than retrospective; to ensure that his decisions function as precedents, “the judge must consider the probable impact of alternative rulings on the future behavior of people engaged in activities that give rise to the kind of accident involved in the case before him.”<sup>9</sup> Thus, “[t]he basic function of law in an economic or wealth-maximization perspective is to alter incentives.”<sup>10</sup> A legal rule should create incentives to maximize wealth; therefore, legal rules should generally impose liability on those who are in the best position to avoid losses and on those who would otherwise be tempted to engage in acts that are not wealth-maximizing. To formulate specific rules of liability, economic analysts such as Posner frequently resort to speculation about whether the plaintiff or the defendant in typical fact situations would be the least cost avoider, or whether the plaintiff and the defendant would have transacted in the absence of the market imperfections that keep them apart. But speculation is not the economic analyst’s only method; at least in principle, appropriate

---

6. *Id.* at 501; see also OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167 (1920).

7. Singer, *supra* note 3, at 503; cf. Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *YALE L.J.* 949, 955 (1988) [hereinafter Weinrib, *Legal Formalism*] (“The dominant tendency today is to look upon the content of law from the standpoint of some external ideal that the law is to enforce or make authoritative.”).

8. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 23 (4th ed. 1992) [hereinafter POSNER, *ECONOMIC ANALYSIS*].

9. *Id.* at 24.

10. Richard A. Posner, *Utilitarianism, Economics, and Social Theory*, in *THE ECONOMICS OF JUSTICE* 48, 75 (1981) [hereinafter POSNER, *Utilitarianism*].

liability rules can be assessed based on empirical study of their effects. Thus, like early legal realism, Posner's economic analysis seeks to attend to the social impact of judicial decisions.

Further, Posner's approach illustrates the anti-conceptualism characteristic of realism. Responding to the argument that economic analysis ignores justice, Posner says that a "meaning of justice, perhaps the most common, is—efficiency."<sup>11</sup> This odd-sounding statement makes sense if all the concepts that lawyers normally associate with the operation of justice are seen as devices for promoting efficiency:

We shall see, among many other examples, that when people describe as unjust convicting a person without a trial, taking property without just compensation, or failing to make a negligent automobile driver answer in damages to the victim of his negligence, this means nothing more pretentious than that the conduct wastes resources . . . . And with a little reflection, it will come as no surprise that in a world of scarce resources waste should be regarded as immoral.<sup>12</sup>

The work of economic analysts of law consists largely of taking legal doctrines and showing how the law's conceptual apparatus means nothing in itself but promotes efficiency. For example, where a formalist such as Weinrib explains the causation requirement in tort as conceptually necessary because it connects the conduct of the particular defendant to the injury of the particular plaintiff,<sup>13</sup> Posner argues that the causation requirement ensures that the proper amount of risky behaviour is deterred.<sup>14</sup>

### B. Posner's Formalism

To call Posner a formalist runs against the standard understanding of his work. Weinrib explicitly identifies Posner's work as "non-formalistic discourse,"<sup>15</sup> while Posner's skepticism about whether and to what extent law is an autonomous department of social thought,<sup>16</sup> his repudiation of "neo-traditionalism,"<sup>17</sup> and in particular, his rejection of Weinrib's "apparatus,"<sup>18</sup>

11. POSNER, *ECONOMIC ANALYSIS*, *supra* note 8, at 27.

12. *Id.* at 27.

13. Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987) [hereinafter Weinrib, *Causation*].

14. POSNER, *ECONOMIC ANALYSIS*, *supra* note 8, at 182-83. The example of causation is considered at length below.

15. Weinrib, *Legal Formalism*, *supra* note 7, at 979 n.66.

16. RICHARD A. POSNER, *Neotraditionalism*, in *THE PROBLEMS OF JURISPRUDENCE* 423, 451-453 (1990) [hereinafter POSNER, *Neotraditionalism*].

17. *Id.* at 451-53.

constitute a decisive rejection of the formalist label. Further, Posner's use of wealth maximization as both a normative goal and an explanation for the development of common law jurisprudence is a classic mark of realism. Yet I argue that his approach can be interpreted as a type of formalism. Below, I briefly consider Posner's use of non-instrumental values to justify wealth maximization, but conclude that his formalism is not located in this justification. Rather, it is Posner's use of the concept of the hypothetical market that reveals his formalism.

Despite the instrumental thrust of economic analysis of law, Posner occasionally tries to ground his normative framework by appealing to some process values such as consent.<sup>19</sup> He argues first that "it is . . . possible to locate Pareto ethics in the Kantian philosophical tradition" because "the operational basis of Pareto superiority" is consent.<sup>20</sup> Since a Pareto superior transaction is one which benefits at least one person without making any other person worse off, the suggestion that consent is the basis of Pareto superiority has some plausibility. But Posner's usual ethical criterion is a different one, namely, wealth maximization or Kaldor-Hicks efficiency. A transaction is Kaldor-Hicks efficient if it has the *potential* to be Pareto superior, that is, if the winners could in principle compensate the losers. Posner seeks the consensual basis of Kaldor-Hicks efficiency in the concept of *ex ante* consent:

It is my contention that a person who buys a lottery ticket and then loses the lottery has "consented" to the loss so long as there is no question of fraud or duress . . . Many of the involuntary, and seemingly uncompensated, losses experienced in the market or tolerated by institutions that take the place of the market where the market cannot be made to work effectively are fully compensated *ex ante* and hence are consented to in the above sense.<sup>21</sup>

As an example of this argument, Posner considers the plight of a driver who is injured in a traffic accident without any negligence involved. Under strict liability, this driver would have been compensated, but under negligence law he goes uncompensated. In what sense can this driver be said to have "consented" to absorb this loss? Posner suggests that, assuming negligence is

---

18. *Id.* at 447.

19. As Singer states, "law and economics scholars justify rule choices by reference to consent within a fair process. The goal of wealth maximization is to give people what they want by mimicking what people would bargain for in the absence of impediments to agreement." Singer, *supra* note 3, at 516.

20. RICHARD A. POSNER, *The Ethical and Political Basis of Wealth Maximization*, in *THE ECONOMICS OF JUSTICE* 88, 89 (1981) [hereinafter POSNER, *Wealth Maximization*].

21. *Id.* at 94.



superior to strict liability in a wealth maximizing sense, the driver could have obtained first-party insurance to cover this loss, "by hypothesis at lower cost than he could obtain compensation ex post through a system of strict liability."<sup>22</sup> By not purchasing this insurance, the driver has given ex ante consent to absorb this loss.

The difficulty with this argument is twofold. First, the link between Pareto superiority and consent, which seems at first uncontroversial, is not strong. There is no incoherence in refusing to consent, for all sorts of reasons, to a Pareto superior transaction.<sup>23</sup> The link between consent and wealth maximization is, a fortiori, even weaker. The "ex ante" approach suggests that we have consented in advance to absorb any losses that may fall on us by voluntarily entering into a fair lottery. For the metaphor of the lottery to capture this concept of consent, a complete set of fully functional markets for all commodities, including contingent claims, would be required. But the existence of such a set of markets would obviate most of the legal doctrines Posner is concerned to explicate, by making actual the hypothetical market transactions that these doctrines encourage. Second, the concept of hypothetical consent avoids any reference to the values of autonomy and personal choice that make us believe that consent is relevant from the start. If wealth maximization is the goal, then consent—or any other process for achieving it—is only instrumental and not justificatory.<sup>24</sup> The attempt to use process values such as consent adds nothing to Posner's argument.<sup>25</sup>

---

22. *Id.* at 95.

23. See Ernest J. Weinrib, *Utilitarianism, Economics, and Legal Theory*, 30 U. TORONTO L.J. 307, 318-19 (1980) [hereinafter Weinrib, *Utilitarianism*]; cf. Amartya K. Sen, *Well-being, Agency, and Freedom*, 82 J. PHIL. 169, 218 (1985) [hereinafter Sen, *Well-being*]; Amartya K. Sen, *Liberty and Social Choice*, 80 J. PHIL. 5 (1983) (conflict between rights and welfarist outcomes); Amartya K. Sen, *Utilitarianism and Welfarism*, 76 J. PHIL. 463, 482 (1979) (discussing the possibility of treating both welfare and effects on rights as consequences).

24. Posner notes a superficial similarity between his use of the ex ante approach to derive consent and Rawls's use of the original position to derive principles of justice. Yet he argues that his approach is superior because it relies on "actual people, deploying actual endowments of skill and energy and character, making choices under uncertainty" rather than on individuals who do not know what their preferences and capacities will be. POSNER, *Wealth Maximization*, *supra* note 20, at 100. The more real people are, the less plausible it is to suggest that they have consented to the social institutions they face.

25. Posner's most recent discussion of the relationship between the Pareto principle and wealth maximization avoids the use of the word "consent," but it does not solve the difficulties associated with the distinction between welfare ex ante and ex post. RICHARD A. POSNER, *The Economic Approach to Law*, in *THE PROBLEMS OF JURISPRUDENCE* 353, 389-90 (1990) [hereinafter POSNER, *Economic Approach*]. For related criticisms of the concept of hypothetical consent in Posner's work, see Weinrib, *Utilitarianism*, *supra* note 23, at 319-25 and JULES COLEMAN, *MARKETS, MORALS AND THE LAW* 118-21 (1988).

Thus, Posner's formalism is not located in his appeal to process values.<sup>26</sup> I suggest instead that Posner's formalism can be seen in the way he uses market analysis. The central concept for economic analysis of legal doctrine is the hypothetical market, the market that would have existed but for transactions costs:

Hypothetical-market analysis plays an important role in the economic analysis of the common law. Much of that law seems designed, consciously or not, to allocate resources as actual markets would, in circumstances where the costs of market transactions are so high that the market is not a feasible method of allocation.<sup>27</sup>

The key to Posner's formalism is the structure that this approach imposes on the relationship between the parties to a lawsuit. Consider a normal market transaction. The salient features of this transaction, from an economic point of view, are the preferences, income, wealth, and property rights held by each party, as well as the rules and the competitive character of the market in which the transaction occurs. The economist's understanding of this transaction is a coherent structure in which each of these features—I shall call them "economic characteristics"—plays a necessary role in explaining the quantity exchanged and

---

26. Singer argues that law and economics is formalist in three ways, but in my view Singer is simply identifying criticisms that are recognized by economic analysts themselves. Singer argues first that "very little law and economics literature offers empirical evidence about what people want or about the likely consequences of alternative rules." Singer, *supra* note 3, at 522. This complaint merely echoes practitioners of economic analysis. See MICHAEL TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 86, 246 (1993); POSNER, *Economic Approach*, *supra* note 25, at 374. "Second, it is highly formalistic to seize on willingness to pay as conclusive evidence that a market transaction has in fact benefited both parties." Singer, *supra* note 3, at 522. This complaint indicates economic analysts' unjustifiable disregard for the huge literature in economics on the relationships among willingness to pay, individual utility, and market performance, but it is not evidence of formalism. See generally AMARTYA K. SEN, *CHOICE, WELFARE AND MEASUREMENT* (1982) [hereinafter SEN, CHOICE]; Sen, *Well-being*, *supra* note 23; John Broome, *Utility*, 7 *ECON. & PHIL.* 1 (1991); Graham Loomes & Robert Sugden, *Regret Theory: An Alternative Theory of Rational Choice under Uncertainty*, 92 *ECON. J.* 805 (1982). "Third, . . . [t]he idea of a 'transaction cost' is not self-defining. Yet the question of what is and is not a transaction cost is absolutely critical for law and economics arguments." Singer, *supra* note 3, at 523. This criticism fits with Stanley Fish's concept of the hallmark of formalism, the desire for a self-declaring interpretation-stopper. See STANLEY FISH, *The Law Wishes to Have a Formal Existence*, in *THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO* 141 (1994). Transactions costs are to economic analysis what the idea of applying legal rules was to traditional formalists: the uninterpretable foundation for legal argument. This criticism has been identified by some economic analysts themselves, though perhaps they do not realize its potentially destructive implications. See Victor P. Goldberg, *Production Functions, Transactions Costs, and the New Institutionalism*, in *ISSUES IN CONTEMPORARY MICROECONOMICS AND WELFARE* 395, 398-400 (George R. Feiwel ed., 1985). Thus, the grounds on which Singer calls economic analysis formalist simply indicate areas where economic analysis could, on its own terms, be improved.

27. POSNER, *Utilitarianism*, *supra* note 10, at 62.

the price at which the exchange occurs, and in which none of these features would have any significance by themselves.<sup>28</sup> For example, a party's preferences mean nothing in themselves; preferences translate into a particular demand only when they are considered in light of the party's income, and the prices of all commodities. To view the parties in this way is to view them in light of a "market form," which abstracts from some of a person's characteristics in order to emphasize the importance of others. Further, if some form of economic efficiency is taken as the normative standard appropriate to commercial transactions, then the "market form of justice" is a structure in which the parties to a transaction are related by the question of whether the transaction is efficient, and in which any disputes should be resolved by reference to the parties' economic characteristics. Posner's method is to put the parties to a legal dispute into the market form and to ask economic questions about their relationship. The hypothetical market is one example of the market form,<sup>29</sup> and Posner's analysis of the common law attempts to demonstrate a coherence between this form and the features of common law doctrine.

Posner thus puts all lawsuits in a form in which the relevant characteristics of the parties are not their rights or their doing, not their suffering of harm nor their subjection to common burdens and benefits,<sup>30</sup> but rather their economic characteristics. Indeed, Posner comes very close to recognizing the formalism of his strategy by placing all transactions in this form:

The requirement that the law must treat equals equally is another way of saying that the law must have a rational structure, for to treat differently things that are the same is irrational. Economic theory is a system of deductive logic: when correctly applied, it yields results that are consistent with one another. Insofar as the law has an implicit economic structure, it must be rational; it must treat like cases alike.<sup>31</sup>

---

28. The central message of economics to a lay person is the nature and importance of the interdependence between price and quantity in a world of scarcity. See STEVEN E. RHOADS, *THE ECONOMIST'S VIEW OF THE WORLD* (1985), or any introductory textbook. In many ways, economic analysis of law is simply the elaboration of this message to the legal community.

29. The other two examples of the market form in Posner's analysis are the explicit market and the non-explicit, but non-hypothetical, market. POSNER, *Utilitarianism*, *supra* note 10, at 61.

30. These are the characteristics that are relevant to corrective and distributive justice, which Weinrib identifies as the only two coherent ways to organize legal relationships. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW 72-75* (1995) [hereinafter WEINRIB, *THE IDEA OF PRIVATE LAW*].

31. POSNER, *Utilitarianism*, *supra* note 10, at 75; cf. POSNER, *Economic Approach*, *supra* note 25, at 361 ("the economic analyst can deduce . . . the set of legal doctrines that will express and perfect the inner nature of the common law").

Posner, like Weinrib, thinks that the law has an intelligible structure; Posner, like Weinrib, believes that explicating this structure requires an assessment of the ways in which things are similar and different; and Posner, like Weinrib, believes that this exercise will reveal the moral principle that animates private law.<sup>32</sup> Posner's view that all adjudications must cohere with the market form of human interaction is formalist in its attempt to eliminate a great deal of information about the parties. Although Weinrib wants to eliminate questions such as the wealth of the parties and their moral worth, Posner must include economic characteristics (such as the parties' wealth) and eliminate the parties' rights (which are merely instrumental). To say that Posner simply disagrees with Weinrib about which factors are relevant to the relationship between the plaintiff and the defendant would be to oversimplify. Yet, both are formalists because of their reliance on a notion of coherence, and both are realists because of the factors they allow to determine coherence. They differ not in their method but in their moral theory.

Posner's approach is not only formalist in method, the formalism of his approach sometimes undermines the instrumental concern with which it began, giving it a non-instrumental flavour more characteristic of formalism. The economic analysis of law contains a deep tension between two possible roles for the court: a tribunal of efficiency or a promulgator of proper incentives.<sup>33</sup> If the court acts as a tribunal of efficiency, it must decide how the parties in one lawsuit would have contracted in the absence of transactions costs, but then the court's decision has no value as an incentive to any agents outside that lawsuit (except perhaps those with identical economic characteristics). However, if the court seeks to promulgate a rule that will act as an incentive for the majority of agents, or for the typical agent, to behave efficiently, the court will not necessarily enforce the hypothetical market bargain that the particular parties to the lawsuit would have struck.

Posner recognizes this tension but seems to underestimate its significance. For example, in discussing the unity that the economic approach imposes on the common law, he suggests that "[a]lmost any tort problem can be solved as a contract problem, by asking what the people involved in an accident would have agreed on in advance with regard to safety measures if transaction costs had not been prohibitive"<sup>34</sup> and that "almost any contract problem can be solved as a tort problem by asking what sanction is necessary to prevent the performing or

---

32. See *infra* notes 38-71 and accompanying text for a discussion of Weinrib's formalism.

33. Posner sometimes describes the common law as "form[ing] a system for inducing people to behave efficiently" and sometimes as "bring[ing] about the allocation of resources . . . that the market would bring about if the market could be made to work." POSNER, *ECONOMIC ANALYSIS*, *supra* note 8, at 252.

34. *Id.*

paying party from engaging in socially wasteful conduct.”<sup>35</sup> There is a significant difference between these two formulations. The first focuses strictly on the parties to the lawsuit and on their economic characteristics, not on the economic characteristics of agents who are not before the court.<sup>36</sup> If the court’s job is to vindicate the hypothetical market transaction that the plaintiff and the defendant would have made, then there is a perfectly coherent reason for the court to attend to the economic characteristics of these parties. The second focuses instead on the effects of the court’s decision on the behaviour of other people in the future. The second formulation is more true to the instrumentalism of economic analysis, while the first is more true to the formalism of the market form. The discussion of causation below suggests that Posner has considerable difficulty in deciding, in any given case, which of the two formulations to use. However the choice is made, Posner’s analysis requires a selection of certain features of the relationship between the parties and the exclusion of others, that is, it requires the imposition of a form.

It may be argued that what I have called Posner’s formalism—his selection of economic characteristics and disregard of others—is not formalism in the sense I outlined in the Introduction. Posner’s selection of economic characteristics, it will be argued, is not for the purpose of understanding the internal structure of the law, but for facilitating the law’s instrumental pursuit of the external goal of wealth maximization. There are two responses to this argument. The first raises the question of when something is internal to the law. When a legislative body passes a law with an economic purpose, there is no doubt that law is being used instrumentally, but when Posner claims that a concern with wealth maximization is inherent in the common law, it is no longer so clear that the law is instrumental. Posner’s claim may be mistaken, but it is no less formalist than Weinrib’s argument that the structure of private law reflects the requirements of Kantian right.<sup>37</sup> Second, to the extent that Posner sees the court acting as a tribunal of efficiency—and I argue below that this is the only way to understand some of his arguments regarding causation—the use of the market form does not have an instrumental purpose. It has instead the purpose of doing justice (as Posner sees it) between the parties. Once again, this way of looking at private law may be mistaken, but it is no less formalist than Weinrib’s argument that private law is exclusively concerned with corrective justice.

---

35. *Id.* at 253.

36. Weinrib objects to economic analysis of law in part because of the first of these formulations. According to Weinrib, if the function of law is to provide incentives for efficient behaviour, then there is no particular reason to join a particular plaintiff and a particular defendant in a given lawsuit. WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 47. This objection is persuasive against the first of Posner’s formulations but not against the second.

37. See *infra* notes 64–69 and accompanying text.

### III. WEINRIB AND THE DEPENDENCE OF FORMALISM ON REALISM

#### A. Weinrib's Formalism

Weinrib's formalism is a method of understanding private law from the inside. This method takes legal relationships as its objects of study<sup>38</sup> and seeks to understand their internal conceptual structure with the hypothesis that all private law relationships are instances of some more basic form. Weinrib's formalism studies this conceptual structure on its own terms to discover the normative standpoint that is attributable to private law doctrines. Thus Weinrib rejects all realist and contingent explanations of legal doctrine in favor of an analysis of the form that legal doctrines take, using the three ideas of character, kind, and unity:

Character refers to the features of private law that are salient in juristic experience. Kind suggests that private law is a distinct phenomenon, categorically different from other modes of legal ordering. And unity is necessary to elucidate the nature of coherence in legal ordering. My contention is that the conjunction of these ideas under the banner of legal formalism constitutes a single integrated approach to legal understanding.<sup>39</sup>

Form is the ensemble of characteristics that constitute the matter in question as a unity identical to that of other matters of the same kind and distinguishable from matters of a different kind. Form is not separate from content but is the ensemble of characteristics that marks the content as determinate, and therefore marks the content as content.<sup>40</sup>

Weinrib makes three further points about the use of the ideas of character, kind, and unity. "First, to see the form of something is to regard that thing as having a certain character."<sup>41</sup> On this point, Weinrib emphasizes the importance of the "selection of the attributes so decisive of the thing's character that they can truly be said to *characterize* it."<sup>42</sup> This process of characterization is the first step on the internal understanding of a legal relationship. Second, "form is a means of classification"<sup>43</sup> or (what amounts

---

38. Ernest J. Weinrib, *The Jurisprudence of Legal Formalism*, 16 HARV. J. L. & PUB. POL'Y 583, 584 (1993) [hereinafter Weinrib, *The Jurisprudence of Legal Formalism*].

39. WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 22.

40. Weinrib, *Legal Formalism*, *supra* note 7, at 958.

41. *Id.* at 959.

42. *Id.*

43. WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 27.

to the same thing) “form signifies the genericity of the thing’s character.”<sup>44</sup> Some legal relationships resemble other legal relationships because they can be classified as instances of the same kind of justice. Third, “form is a principle of structure unity;”<sup>45</sup> it relates the different aspects of a thing in a coherent way. The components of a legal relationship “are . . . the interdependent constituents of an internally coherent whole” rather than “an aggregate of autonomous elements.”<sup>46</sup>

Weinrib argues further that there are two forms of justice that can characterize a coherent legal system.<sup>47</sup> They are corrective justice and distributive justice. Corrective justice “captures the correlativity within a single transaction, of wrongful doing and suffering—and with it the correlativity in private law of the defendant’s duty to avoid inflicting such suffering and the plaintiff’s right to immunity from it.”<sup>48</sup> Tort, contract, and restitution have the “bilateral aspects” typical of structures of corrective justice. Each of these legal relationships, properly understood, connects the plaintiff and the defendant in an intelligible relationship and gives a reason for requiring the particular defendant to provide a remedy to the particular plaintiff. Distributive justice, in contrast, is a structure “in which parties are related, not as doer and sufferer, but as persons subject to a common benefit or burden.”<sup>49</sup> A claimant under a scheme of distributive justice argues not that he or she has been wronged and is entitled to a remedy, but that he or she is one of the class of persons to which a benefit is supposed to flow, and is entitled to his or her share of that benefit. Unemployment insurance, no-fault compensation for automobile accidents, and taxation have the structure of distributive justice.

But the two forms of justice do not demand any particular substantive distribution of rights and duties or the implementation of any particular social purpose. Rather, they demand that the substantive doctrines have a particular structure: “Corrective justice discloses the form of a transaction as the immediate interaction of two parties. The proportional equality of distributive justice captures the structure of a distribution by indicating what distinguishes

44. Weinrib, *Legal Formalism*, *supra* note 7, at 960.

45. *Id.*

46. WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 25.

47. Weinrib nowhere expressly states that there are *only* two forms of justice. However, his view that all forms of private law liability are instances of corrective justice while public law is the realm of distributive justice, and his description of the forms of justice as universals, strongly suggest that, at least, his formalism does not require any additional forms of justice. See WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 204-06; Ernest J. Weinrib, *Formalism and Practical Reason, or How to Avoid Seeing Ghosts in the Empty Sepulchre*, 16 HARV. J. L. & PUB. POL’Y 683, 691 (1993) [hereinafter Weinrib, *Formalism and Practical Reason*].

48. Weinrib, *Legal Formalism*, *supra* note 7, at 978.

49. *Id.* at 979.

a distribution from a merely haphazard dispersion among persons and goods.”<sup>50</sup>

Formalism has nothing to say about how particular facts will be treated by the legal system; all it says is that a coherent legal system must not confuse the two forms of justice.

[T]he effects that one person might have on another cannot be preclassified as belonging to one or the other form. For the formalist the crucial consideration is not what happened but how one is to understand the justificatory structure that is latent in the legal arrangements that might deal with what happened.

Formalism, accordingly, is not a kind of jurisprudential federalism with different incidents assigned to the jurisdiction of either corrective or distributive authority. Nor does formalism provide a basis for preferring to treat the facts of the world in accordance with one form rather than the other; such preference can come neither from within either form nor from any overarching form.<sup>51</sup>

But the forms of justice themselves cannot be contingent; politics is excluded from law in the sense that the appropriate form of law must govern once a problem is presented in a particular form:

Adjudication involves holding the particular transaction or distribution to its coherence as a transaction or a distribution. The judge is prohibited from orienting the juridical relationship to some external goal of the judge's choosing. The justificatory structures of corrective and distributive justice set the conceptual limits of the judge's jurisdiction, and the judge's role is to apply, in the context of a particular episode of adjudication, the form of justice appropriate to it.<sup>52</sup>

Finally, the forms of justice are mutually irreducible; although corrective justice is conceptually prior to distributive justice, the two forms are categorically different. Thus, the considerations relevant to one can only produce incoherence when inserted into the other; further, there is no overarching normative structure governing both.<sup>53</sup>

---

50. *Id.* at 981.

51. *Id.* at 985 (footnote omitted).

52. *Id.* at 987.

53. Weinrib, *Formalism and Practical Reason*, *supra* note 47, at 691-95. For some thoughts on how corrective and distributive justice might be related in a formalist analysis, see Peter Benson, *The Basis of Corrective Justice*, 77 *IOWA L. REV.* 515, 601-24 (1992).



This way of looking at law has an important implication for the question of the relationship between law and politics. According to Unger, whose treatment of formalism Weinrib uses as a starting point,<sup>54</sup>

[f]ormalism . . . is a commitment to, and therefore also a belief in the possibility of, a method of legal justification that contrasts with open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary.<sup>55</sup>

While Unger, like his fellow Critical Legal Scholars, economic analysts,<sup>56</sup> and other realists, challenges the very possibility of formalism on the ground that the contrast between law and ideology is ultimately unsustainable,<sup>57</sup> Weinrib embraces the contrast between law and ideology, on the ground that "formalism proffer[s] the possibility of an immanent moral rationality."<sup>58</sup>

The first feature, that law has a distinctive rationality, expresses the formalist conception of law negatively through a contrast with political justification. The second, the immanent operation of legal rationality, characterizes the law's distinctiveness affirmatively through the claim that the content of law is elaborated from within. The third asserts the moral dimension of this rationality, ascribing normative force to its application . . . law is not merely rational *and* immanent *and* normative; rather, it has each of these qualities only because it also has the other two.<sup>59</sup>

If private law can be understood in this way, it is non-political in the sense that it does not promote any purpose external to its own normativity. Thus, immanence is not only "[t]he most mysterious of the three formalist attributes"<sup>60</sup> but also the most crucial. The rationality and normativity of private law cannot be understood by looking outside law or by imposing the concerns of "an independently desirable political purpose."<sup>61</sup> Nor can rationality and normativity be understood separately, rather than can be understood only by studying the internal logic of law. Weinrib's claim is not that private law has no external effects, but rather is that law cannot be understood in terms of these effects. If law really was "all politics," then these

54. Weinrib, *Legal Formalism*, *supra* note 7, at 954.

55. ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 1 (1986).

56. "[U]ltimately law . . . is political." POSNER, *Neotraditionalism*, *supra* note 16, at 427.

57. UNGER, *supra* note 55, at 8-11.

58. WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 23.

59. Weinrib, *Legal Formalism*, *supra* note 7, at 954-55.

60. *Id.* at 955.

61. *Id.* at 957.

external effects would be all that mattered. Weinrib's formalist method and his belief in the possibility of a non-political analysis of private law are thus closely linked.

When Weinrib analyzes law in accordance with his formalist methodology, he finds that private law relationships consistently take the form of corrective justice. Because private law relationships are bipolar, involving a claim by one agent against another agent, they must be instances of corrective, not distributive, justice. A claim in tort, for example, is not a claim that the mere fact of the plaintiff's injury entitles him or her to compensation. Rather, it is a claim that the defendant wrongfully injured the plaintiff and that the defendant must compensate the plaintiff to restore the two parties to the equality (in a particular sense) they enjoyed before the wrongful interaction.<sup>62</sup> Similarly, a claim in contract is not a claim that the defendant has injured the public at large by behaving inefficiently. Rather, it is a claim that the defendant has violated a right of the plaintiff, a right that was created in the process of contracting.<sup>63</sup>

In the final stage of his analysis, Weinrib finds that the justificatory force of corrective justice is located "in the conceptual structure of free agency"<sup>64</sup> rather than in the vindication of any external or public goals. Thus, private law is properly understood as the legal regulation of agents who are capable of making choices, not as imposing particular choices on agents. This conceptual structure does not completely specify the particular doctrinal choices that must be made by a legal system, but it does mean that "particular choices are required to live up to the formal standpoint that characterizes the purposive activity of free agents."<sup>65</sup> A legal regime that governs the interaction of free agents is a regime of rights and duties in which adjudications cannot take account of considerations of well-being, advantage, or virtue, because these considerations would require the imposition of particular ends on agents who, in private law, are conceived of as having only the capacity to choose ends rather than any particular ends.<sup>66</sup> In Kantian terms, private law is the external regulation of the interaction of free, purposive beings. This regulation derives only from the demands of personality, that is, from the *capacity* to choose ends rather than from any specific end.<sup>67</sup> Thus, for private law, "freedom manifests

---

62. WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 134-36.

63. *Id.* at 136-40.

64. Weinrib, *The Jurisprudence of Legal Formalism*, *supra* note 38, at 590.

65. *Id.*

66. WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 110-11.

67. *Id.* at 111; *see also* IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 42, 63 (Mary Gregor trans., 1991) (1797); G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* ¶¶ 34-40 (T.M. Knox trans., 1952) (1821). Weinrib usually speaks of private law in Kantian terms, but he has argued, controversially, that a Hegelian analysis would lead to the same understanding of private law. *See* Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 *CARDOZO L. REV.* 1283 (1989); Ernest J.

itself juridically in rights that others are obligated not to violate.”<sup>68</sup> Corrective justice is the form appropriate to governing these interactions, because it has a bipolar structure and is concerned with the doing and suffering of harm. The type of equality that is vindicated by corrective justice is the equality of self-determining agents.<sup>69</sup>

Weinrib argues that these conclusions about the structure of private law are derived from the application of formalist method to positive law as we, as lawyers, encounter it. We know that the conclusion is correct because it gives a coherent explanation of private law relationships. By coherence, Weinrib means “the intrinsic unity of the features that cohere.”<sup>70</sup> That is, private law relationships do not just happen to have the features that we see in them; rather, the features are related to each other in a unified way. For example, Weinrib argues that economic interpretations of private law are incoherent because they fail to account for the bipolar nature of litigation.<sup>71</sup> If the purpose of private law was really to promulgate incentives for wealth-maximizing behaviour, the courts would have no reason to wait for a tort or a breach of contract to come along; nor would there be any reason for the successful plaintiff, rather than the state, to receive the damage award that is extracted from the defendant. A coherent explanation of private law must account for this bipolarity, and must account for it in terms of the other features of private law: the roles of right and duty, the requirements of fault and cause in tort, the requirement of mutuality in contract, and so forth. Coherence is the formalist criterion of truth, because a coherent explanation of law is the most (but also the least) to which we can aspire.

### B. Weinrib's Realism

Weinrib's formalism is not linguistic formalism. Weinrib does not claim that “it is possible to put down marks so self-sufficiently perspicuous that they repel interpretation.”<sup>72</sup> Further, Weinrib's formalism does not have the rigid deductivism that Critical Legal Scholars sometimes take to be the hallmark of

---

Weinrib, *Professor Brudner's Crisis*, 11 CARDOZO L. REV. 547 (1990); *contra* Alan Brudner, *Hegel and the Crisis of Private Law*, 10 CARDOZO L. REV. 949 (1990).

68. Weinrib, *The Jurisprudence of Legal Formalism*, *supra* note 38, at 591.

69. WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 81-82.

70. *Id.* at 35.

71. *Id.* at 46-48.

72. FISH, *supra* note 26, at 142; *contra* WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 31-32. Weinrib has generally avoided engagement with the interpretive school represented by Dworkin and by Fish (who criticized Dworkin for not being interpretive enough). See RONALD DWORCKIN, *LAW'S EMPIRE* (1986); STANLEY FISH, *Still Wrong After All These Years*, in *DOING WHAT COMES NATURALLY* 356 (1989).

formalism.<sup>73</sup> It is, rather, a conceptual formalism. As such, it depends upon contingency, on the social and historical particulars that express the forms of justice in any particular legal system.<sup>74</sup> This dependence must be tightly constrained. A successful formalist explanation of legal doctrine depends on contingent historical and social factors *only* insofar as they are the material through which legal concepts appear in the world, and no farther.

I suggest that, although Weinrib admits this form of contingency and “repudiate[s] the myth that the formalist’s conceptualism commits private law to a deductive moral geometry,”<sup>75</sup> he underestimates the distance that contingency creates between the forms of justice and the particular legal doctrines that emerge in positive law and the results of particular cases.<sup>76</sup> This distance is enormous. Almost nothing flows from Kantian right, or (to put it another way) Kantian right imposes almost no constraint on legal doctrine.<sup>77</sup> Thus, Weinrib’s formalism is silent without realism. Even if private law is the non-instrumental working out of the implications of abstract right, realism is required for that working out to have any content. I consider three doors to contingency, that is, routes by which particular historical and social circumstances can influence legal doctrines and outcomes. I propose that it is the third route that leads to Weinrib’s realism.

Many critics of formalism have complained that formalism cannot produce determinate answers to particular legal problems, and have documented this complaint by analyzing specific common law doctrines.<sup>78</sup> The apparent ability of a given set of legal principles to support opposite outcomes is the first door

---

73. WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 225-26; *contra* Singer, *supra* note 3, at 496-99.

74. WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 204-05.

75. *Id.* at 206.

76. Weinrib is not the only natural rights theorist to underestimate this distance. Peter Benson similarly moves rather quickly from a Hegelian understanding of contract law as part of abstract right to the specific conclusion that the doctrine that the law will not inquire into the adequacy of consideration is mistaken. See Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 *CARDOZO L. REV.* 1077, 1187-98 (1989). Alice Woolley, who persuasively demonstrates the consistency of same-sex marriage with Kantian and Hegelian conceptions of marriage, and thus opposes Kant’s and Hegel’s conclusion that same-sex marriage is inconceivable, spends very little time on the empirical and social questions that constitute the real separation between her and them. See Alice Woolley, *Excluded by Definition: Same sex couples and the right to marry*, 45 *U. TORONTO L.J.* 471 (1995).

77. See Benson, *supra* note 53, at 623-24. Benson seems to recognize the weakness of the constraint imposed by abstract right in his discussion of the relationship between corrective and distributive justice:

78. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685, 1688-89 (1976); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *YALE L.J.* 997, 1102-04 (1985).

to contingency that might worry a formalist. Weinrib responds to this complaint by arguing that determinacy is not a necessary feature of formalism. The forms of justice in themselves do not completely determine substantive legal outcomes; therefore, the coherence of particular judgments cannot be assessed by comparing them with deductions from any particular rules.<sup>79</sup> A judgment is coherent when it conforms to one of the two forms:

. . . juridical relationships can only be understood through the nexus of concepts through which they attain their distinctive inner coherence as expressions of corrective or distributive justice. When these comprehensive abstractions are brought onto the stage, determinacy cannot be a matter of the uniquely correct solution to any particular case, since the particularity of interaction has an aspect of contingency with respect to the concepts under which it falls.<sup>80</sup>

Thus, the first door to contingency, the one most often opened by Critical Legal Studies, can be left open without disturbing the methodological force of Weinrib's formalism.

The decision to characterize a particular set of facts as a "transaction" or as a "distribution," that is, to say that a particular interaction should be classed as an instance of corrective or distributive justice, opens a second door to contingency. This decision cannot be made on purely formal grounds, and is open to the instrumental, or political, considerations that characterize realist approaches to law. However, Weinrib would argue that this decision is outside the power of the judge; it is a legislative decision. This type of contingency does not disrupt the formal structure of private law, because the decision in question is not adjudicative. An example to which Weinrib himself alludes is that there is nothing inherent in the law of personal injury which makes it the subject of corrective justice. Tort law is a type of private law and some personal injuries result from torts; however, particular classes of personal injury (for example, those resulting from workplace accidents or automotive collisions), or the entire subject matter of personal injury, can be removed from the tort system. Injured parties may have access to a fund compensating them regardless of cause or fault. If so, personal injury becomes a subject matter of distributive justice, and Weinrib's formalism insists that applications to the fund for pay-out be handled according to the form of distributive justice.<sup>81</sup> The decision to treat personal injury as a question of distributive rather than corrective justice is, crucially, legislative. It is incoherent for a judge to decide that tort law should be used as a vehicle to distribute losses over the community

---

79. WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 222-26.

80. Weinrib, *Legal Formalism*, *supra* note 7, at 1009.

81. WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 210.

as a whole.<sup>82</sup>

The third door to contingency is closely related to the first but presents a more difficult challenge to Weinrib's formalism. Formalist analysis requires that a legal relationship be examined for the attributes that can be said to characterize it decisively, and Weinrib appears to argue that there is only one way to perform this exercise in selection:

The specification of the characteristics that go to a thing's form is not an exhaustive recapitulation of all of a thing's individuating attributes . . . . Rather, the exercise demands a selection of those attributes so decisive of the thing's character that they can truly be said to *characterize* it. Elucidation of the thing's form therefore entails differentiating between the attributes that are definitive of the thing and those that are merely incidental. . . . Through reference to the ensemble of characteristics that give a thing its character, we comprehend the thing in question as what it is; in classical terminology, we grasp its nature or essence.<sup>83</sup>

If there is only one way to characterize a legal relationship, or if all reasonable people would choose the same attributes in characterizing something, then there is a necessary connection between the legal relationship and the juridical form it takes. However, there is no reason to believe in this sort of essentialism. The features of a thing deemed relevant, even legally, differ depending on the purposes for which one is trying to characterize the thing. Is a baseball bat a weapon? Is a particular negligent act the cause of an injury? Would a duty of easy rescue in tort be a response to "[t]he plaintiff's unilateral need for assistance"<sup>84</sup> and thus outside the ambit of private law, or would it be "the judicial analogue of the moral obligation to respect the person of another and to safeguard his physical integrity"<sup>85</sup> and thus within private law? There is no prospect of a transcendental or metaphysical method of deciding these questions of characterization. Further, these questions cannot be answered by pure deduction from the fact of agency. Thus, Weinrib's emphasis on selection is the third door opening his formalism to contingency.

Once a legal relationship has been properly characterized, it can be compared to other legal relationships to see whether it is of the same form. For example, tort is like contract, because each involves correcting an injustice that one party has inflicted on the other (though the nature of the injustice is quite

---

82. *Id.* at 36-38.

83. *Id.* at 26-27.

84. *Id.* at 154.

85. Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 289 (1980).

different).<sup>86</sup> This process of determining the kind, or genericity, of a legal relationship again opens the third door to contingency, because it is impossible to transcendently determine the essential characteristics of a thing. The process of classifying any two things as being instances of the same kind is open to contingency. Consider Weinrib's discussion of the use of form for classification:

[F]orm is a means of classification. The presence of form makes something not only the thing that it is but also classifiable with other things of the same kind. Because specifying an ensemble of characteristics involves distinguishing the essential from the inessential qualities, form signifies not the thing's fully individuated particularity, but the general class under which it falls. Form goes to species as well as to essence.<sup>87</sup>

Weinrib applies this idea of form to the familiar Platonic example of a table,<sup>88</sup> but the list of attributes which Weinrib says would make something a table—"elevation, flatness, hardness, smoothness, and so on"<sup>89</sup>—are purely physical. Thus essentialism is strongly suggested in Weinrib's use of form as a principle of selection and comparison.

To argue that his formalism is not essentialist, Weinrib points to a difference between essentialism about tables and essentialism about legal relationships. A table is essentially a table in virtue of having certain properties; those "essential properties supply the ultimate measure for understanding what the entity is."<sup>90</sup> But legal relationships are not like that:

Seeing legal formalism as a version of essentialism involves ignoring the primacy of unity over character and kind. It is true that the character of a juridical relationship is contained in the set of features that are salient in our conception of the relationship as the embodiment of a distinct mode of ordering; by referring to that combination of features, accordingly, juristic experience allows us to identify the kind of relationship that we are seeking to understand. A given list of features, however, is not the ultimate criterion of juridical intelligibility. The features are relevant to intelligibility only on the

86. WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 134-36.

87. *Id.* at 27; *see also* Weinrib, *Legal Formalism*, *supra* note 7, at 960 ("genericity").

88. "The set of properties that makes something a table, for instance, is found in all tables and constitutes the genericity of what it is to be a table." Weinrib, *Legal Formalism*, *supra* note 7, at 960; *see also* WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 28.

89. WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 28.

90. *Id.* at 30.

assumption that a sophisticated legal system values its own coherence and that therefore the features that juristic experience regards as salient reflect the system's attempts to achieve coherence. . . . [T]he truly operative criterion is not the presence of the features but their mutual coherence.<sup>91</sup>

Despite this disclaimer, I argue that Weinrib is an essentialist, if not in his description of legal relationships, then in his approach to the features that go into those relationships. Consider tables first. Our decision to call something a table depends ultimately not on any list of physical attributes, but on whether we use it as a table. Even someone's back can be a table, as when students standing in line use each other's backs as convenient places to fill out forms. That is not to say that there is no right answer to the question "is this object a table?" The answer can only be relative to some human interest. It cannot be determined by some list of physical properties that any table should have, because there will always be objects which are tables but lack some of the predetermined attributes, while other objects have all of the predetermined attributes but are not tables.<sup>92</sup>

But what goes for tables also goes for legal relationships. It may be that a coherent system of tort law requires a distinction between misfeasance and nonfeasance, or requires a doctrine of causation. But, our decision to characterize a set of facts as meeting or not meeting these requirements cannot turn on the facts themselves (as Weinrib often seems to assume), but rather on those contingent factors which Weinrib seeks to exclude. Thus, to question Weinrib's essentialism is to fling the third door to contingency wide open.

#### IV. THE EXAMPLE OF CAUSATION

Formalism depends on realism because it is impossible to identify, in a pure and non-contingent way, the features of a matter which constitute its essence. It is impossible to assess whether a particular adjudication is coherent without bringing in the social and historical contingencies that formalism seeks to exclude. No formalist argument can be made without realism. Realism depends on formalism because any attempt to insert a realist principle into legal doctrine requires a decision about what characteristics of a relationship or transaction are relevant. Realism inevitably requires form to realize its project, and thus loses

---

91. *Id.* at 30-31.

92. See Dennis Patterson, *The Metaphysics of Legal Formalism*, 77 IOWA L. REV. 741, 766-69 (1992). Patterson's critique of Weinrib's essentialism is closely related to mine, though it derives from different philosophical sources and it drives Patterson in a Wittgensteinian direction which I am unsure about following.



its desired close connection between adjudication and social reality.<sup>93</sup>

These claims are best appreciated in a discussion of a particular legal doctrine. For this purpose, I have chosen a doctrine of negligence law, the doctrine that the defendant is not liable to the plaintiff unless the defendant's breach of duty caused the plaintiff's injury. Both Posner and Weinrib have written at length on this doctrine, and its elaboration in a series of well-known factual situations raises numerous difficulties. After a brief discussion of Posner's and Weinrib's analysis of causation, I examine several of these cases, and show how neither formalism nor realism is adequate on its own to explain the case law.

### A. Posner's Account of Causation

Consistent with Posner's anti-conceptualism and instrumentalism, Landes and Posner argue that the concept of causation, in itself, plays no role in tort law. Instead, causation is just another device that courts use to promote efficient allocation of resources to care.<sup>94</sup> Negligence law is best explained as the elaboration of the familiar Learned Hand formula, which states that a defendant is negligent if he or she fails to take a cost-justified precaution.<sup>95</sup> The court should compare the cost of the precaution,  $B$ , with the probability-discounted cost of the loss that is avoided,  $pD$ . The defendant can make expenditures,  $z$ , that will increase  $B$  but will decrease  $p$ . Assuming risk neutrality, the optimal expenditure of  $z$ , call it  $z^*$ , is that which minimizes  $L = B + pD$ , the sum of expenditures on care and the expected cost of accidents.<sup>96</sup> The defendant will be liable if  $z < z^*$ , but if the defendant is liable where  $z > z^*$ , he or she will have an incentive to take too much care. This formula and its elaboration explains, in Landes and Posner's view, a number of familiar doctrines of negligence law. For example, the measure of damages should be  $D$ . Any lesser amount would give defendants an incentive to fall below the optimal expenditure of  $z$ , while any greater amount would encourage defendants to take too much care. This theory of negligence law is realist, inasmuch as it seeks to redescribe legal doctrines as devices for achieving an external goal.

Thus, when a court concludes that the defendant's negligence did not cause the plaintiff's injury, the court is really saying that there is no purpose in holding the defendant liable, because the care that the defendant would have

---

93. Cf. Dalton, *supra* note 78, at 1066-67 (discussing that substantive legal doctrines require form for their expression).

94. WILLIAM LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 229-30 (1987).

95. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

96. LANDES & POSNER, *supra* note 94, at 58-62.

taken to meet the standard of care would have made no difference (or only a trivial difference) to the probability that the accident would have occurred. Indeed, to hold defendants liable in these situations would lead to inefficiency; "the effect of liability would be . . . like imposing punitive damages."<sup>97</sup> People would tend to invest in care to avoid liability for uncaused harm; however, this extra care would have no social utility, because it would not in fact prevent the uncaused harm.

Landes and Posner mathematically analyze causation as follows. Let  $z$  be units of care expended to meet some standard of care, and let  $\phi(z)$ ,  $\phi'(z) < 0$ , be the probability that the standard of care will be violated. Further, let  $p|v$  be the probability of an accident conditional on the defendant's violating the standard of care, and  $p|n$  be the probability of an accident conditional on the defendant's meeting the standard of care. Finally, let  $D$  be the damages incurred in case of an accident, and  $B(z)$ ,  $B'(z) > 0$ , be the cost of  $z$ .<sup>98</sup> Note that in this model, expenditures on care do not directly affect the conditional probabilities of an accident's occurring. Rather, expenditures affect the probability that the standard will be met, and thus indirectly reduce the probability of an accident by reducing  $\phi(z)(p|v) + (1 - \phi(z))(p|n)$ .

The sum of accident and precaution costs is thus<sup>99</sup>  $L = \phi(z)(p|v)D + (1 - \phi(z))(p|n)D + B(z)$ . Minimizing this function with respect to  $z$  yields<sup>100</sup>  $-\phi'(z)(p|v - p|n)D = B'(z)$ .

Landes and Posner argue that the question of causation can be answered by looking at the expression  $p|v - p|n$ . That is, the defendant's breach of the standard caused the accident if  $p|v - p|n$  is positive. If  $p|v - p|n$  is zero—that is, if  $p|v = p|n$ —additional care does not affect the probability of an accident,<sup>101</sup> so the defendant should not be liable for failing to provide the care. A rule that made defendants liable even where  $p|v - p|n$  was zero would lead to investments in care that were socially unproductive. Defendants would undertake such investments in order to avoid liability, yet no additional injury would be prevented.<sup>102</sup>

97. POSNER, *ECONOMIC ANALYSIS*, *supra* note 8, at 183.

98. I ignore all other due care levels of the plaintiff and the defendant, assuming like Landes and Posner for the purposes of this exercise that they have been optimized.

99. LANDES & POSNER, *supra* note 94, at 232, Eq. (8.3).

100. *Id.* at 233, Eq. (8.4).

101. Recall that this effect is indirect. Increases in  $z$  will still increase the probability that the standard of care will be met, but if  $p|v - p|n = 0$ , meeting the standard will not itself affect the probability of an accident.

102. LANDES & POSNER, *supra* note 94, at 230-33.

Consistent use of this realist explanation of causation in tort law would require complete detachment not only from the traditional “but for” test and from any intuitive or common sense notion of cause, but also from the formalist view of causation as connecting plaintiff and defendant. The inquiry into causation would be rigorously focussed on the incentives created by the doctrines of causation, and not on the doctrines themselves. In the discussion of the case law below, I show that Landes and Posner do not consistently analyze causation in the manner required by Posner’s realism. His explanations of legal doctrine continually advert to the formalism of the hypothetical market.

### B. Weinrib’s Account of Causation

Consistent with his formalist methodology, Weinrib seeks “a non-instrumental understanding of the place of causation in negligence law,”<sup>103</sup> an explanation of the role of causation in terms of negligence law itself, rather than in terms of some external goal. The requirement of causation is properly understood for the role it plays in connecting the plaintiff and the defendant:

Tort litigation operates through and upon the relationship of plaintiff and defendant. Causation is the element in this relationship that functions to particularize the former as the victim of the latter’s wrongdoing. The bilateral nature of tort litigation requires our asking not only “Why can this plaintiff recover from *this* defendant?” but also “Why can *this* plaintiff recover from *this* defendant?”<sup>104</sup>

The defendant’s wrongdoing, though necessary for liability, is not sufficient. Some harm must materialize from the wrongdoing. Similarly, the mere fact of the plaintiff’s injury, even if caused by the defendant, is necessary but not sufficient for liability. The defendant’s act must also be wrongful.<sup>105</sup> Causation and wrongdoing are not two requirements that just happen to be part of negligence law; rather, they are intrinsically linked.

A wrongful act that does not injure lacks impact upon a specific victim; an injury that is not the materialization of a wrong is a misfortune devoid of normative significance for its author. For tort law wrongfulness without causation is empty; causation without wrongfulness is blind.<sup>106</sup>

---

103. Weinrib, *Causation*, *supra* note 13, at 409.

104. *Id.* at 414.

105. *Id.* at 429-30.

106. *Id.* at 430.

This account of the role of causation in negligence law purports to justify the causation requirement without reference to any external goals that tort law might serve. It is an internal understanding.

Rather than criticizing this account, I will assume that it is correct. Instead, I question its relevance in deciding whether any particular judicial decision about causation is coherent (I say “coherent” rather than “correct,” because coherence is the formalist criterion for successful explanation of doctrine). I explore a problem which Weinrib set aside—“the nature of causation itself”<sup>107</sup>—to suggest that he cannot set it aside.

### C. Causation is Not Only in the World

The analysis of causation on tort law traditionally proceeds in two stages. First, did the defendant’s breach of duty cause the plaintiff’s injury? Second, if there is such a physical, causal connection, was the defendant’s breach of duty the legally significant cause of the injury?<sup>108</sup> This division of the causal inquiry supposes that there are causes in fact, in other words, that physical processes in the world can be identified as causes apart from any legal inquiry, and that, from among the possible causes in fact, only some should be considered causes in law that ground liability. While lawyers disagree about the extent to which policy is allowed to influence the second stage, the first stage should simply be a matter of fact or of history.

We have already seen that Weinrib, who wants to insulate the explanation of legal doctrine from the contingent influences of history and society, explains the importance of cause in law without reference to policy. But this explanation would be a hollow formalist victory if cause in fact could be determined only by reference to the very contingent factors which are excluded in the determination of cause in law. Cause in fact does have something to do with the world; people do things in the world that, through physical processes, affect other people. But the world, does not determine whether these effects are properly described as causes, be it for legal purposes or for other purposes. In this section, I argue that causation is not determined just by the world, so that the cause in fact inquiry is just as contingent as the cause in law inquiry.<sup>109</sup>

---

107. *Id.* at 408.

108. Ernest J. Weinrib, *A Step Forward in Factual Causation*, 38 *MOD. L. REV.* 518 (1975) [hereinafter Weinrib, *A Step Forward*].

109. This argument is not, of course, original. Weinrib himself once argued that “the primarily evidential nature of cause in fact should not render it impervious to the considerations of policy, purpose and value.” Weinrib, *A Step Forward*, *supra* note 108, at 533; see also George Brencher IV, *Formalism, Positivism, and Natural Law in Ernest Weinrib’s Tort Theory: Will the Real Ernest Weinrib Please Come Forward?*, 42 *U. TORONTO L.J.* 318, 345 (1992). The Critical Legal Scholars have argued that traditional concepts of causation are not objective but are devices for maintaining

In developing this argument, I rely on Hilary Putnam's account of causation. Over the last fifteen years or so, Putnam has developed an interlinked approach to the problems of truth, reason, reference, and knowledge that he calls "internal realism."<sup>110</sup> This approach attempts to avoid both transcendental (or metaphysical) claims about our knowledge of the world and thoroughgoing relativism (or pure solipsism). While Putnam's account of causation is an integral part of his internal realism, it can also be seen as an application of that approach to a particular problem. My suggestion is that once we see the problem of causation in light of Putnam's approach, we also see the extent to which Weinrib's formalism depends on realism.

Putnam begins by asking what it would mean for causation to be defined in purely physical terms. "A cause, in the sense this [physical] definition tries to capture, is a *sufficient* condition for its effect; whenever the cause occurs, the effect *must* follow. . . . Following Mill, let us call such a cause a *total cause*."<sup>111</sup> The difficulty with this definition of "cause" is that it simply does not reflect our use of the word. On the one hand, most of the events we refer to as "causes" are *not* "total causes" in Mill's sense:

When I say 'failure to put out the campfire caused the forest fire', I do *not* mean that the campfire's remaining lit during a certain interval was the *total cause* of the forest fire. Many other things—the dryness of the leaves, their proximity to the campfire, the temperature of the day, even the presence of oxygen in the atmosphere—are part of the *total cause* of the forest fire.<sup>112</sup>

On the other hand, many events or states of the world that do qualify as "total causes" are *not* causes in any practical or everyday sense. If a person is naked in a room at midnight, then "[h]is being naked in the room at midnight -  $\epsilon$ , where  $\epsilon$  is so small that he could neither get out of the room or put on his clothes between midnight -  $\epsilon$  and midnight without moving faster than light,

existing power structures. See Morton J. Horwitz, *The Doctrine of Objective Causation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 201 (David Kairys ed., 1982); MARK KELMAN, *THE CRITICAL LEGAL STUDIES MOVEMENT* 175-76 (1987).

110. I have relied on the following works: HILARY PUTNAM, *REASON, TRUTH AND HISTORY* (1981); HILARY PUTNAM, *Why There Isn't a Ready-Made World*, in *REALISM AND REASON* 205 (1983) [hereinafter Putnam, *Why There Isn't a Ready-Made World*]; HILARY PUTNAM, *THE MANY FACES OF REALISM* (1987) [hereinafter PUTNAM, *MANY FACES*]; HILARY PUTNAM, *Is the Causal Structure of the Physical Itself Something Physical?*, in *REALISM WITH A HUMAN FACE* 80 (James Conant ed., 1990) [hereinafter Putnam, *Causal Structure*].

111. PUTNAM, *Why There Isn't a Ready-Made World*, *supra* note 110, at 212. Putnam's reference, though not identified, is evidently to 1 JOHN STUART MILL, *A SYSTEM OF LOGIC RATIOCINATIVE AND INDUCTIVE* 327-34 (J.M. Robson ed., 1974) (1843).

112. PUTNAM, *Why There Isn't a Ready-Made World*, *supra* note 110, at 212-13.

would be a 'total cause' of his being naked in the . . . room at midnight; but no one would refer to this as the 'cause' of his presence in the room in that state."<sup>113</sup> "Total cause" is not the only possible way to define "cause" in purely physical terms, but it is likely that any attempt at a purely physical definition will similarly fail to capture our sense of how the word should be used.<sup>114</sup> Another approach, which attempts to capture the everyday meaning of "cause" while retaining a strong connection to the physical, is to define certain normal or background conditions against which certain events would have salience as causes.<sup>115</sup> We say that the failure to put out the camp fire caused the forest fire, because we assume that the presence of oxygen and the relative dryness of northern forests are background conditions. But what looks like a background condition or a normal state for some purposes will have precisely the salience required of a cause for other purposes:

Imagine that Venusians land on Earth and observe a forest fire. One of them says, 'I know what caused that—the atmosphere of the darned planet is saturated with oxygen.'<sup>116</sup>

The presence of oxygen is a background condition to us, but for beings from a planet whose atmosphere consists mostly of carbon dioxide, it has a remarkable and dangerous salience. Putnam therefore concludes that what counts as a cause of an event is relative to the interest that prompted the question about the event: "What is and is not a 'cause' . . . depends on

113. *Id.* at 213. I have deleted some irrelevant considerations from Putnam's example.

114. This failure to capture the use of the word "cause" seems to vitiate the otherwise persuasive account of causation given in Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001 (1988). Wright proposes the following definition of cause: "a particular condition was a cause of (contributed to) a specific result if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the result." *Id.* at 1019 (italicized in original). Wright calls this definition of cause the NESS (Necessary Element of a Sufficient Set) test for causation. The NESS test has considerable logical appeal, and may well be superior to Mill's "total cause" for legal purposes, but it does not distinguish among various causes in the manner that is required for tort law. Failure to put out the forest fire is a NESS cause, but so are the presence of oxygen in the air, the dryness of the trees, and so forth. The naked person in the room at midnight may have a legitimate or illegitimate motivation that is a NESS cause of his presence, but so is his presence in the room at midnight -  $\epsilon$ . The NESS test is a useful part of the causal inquiry, but Wright's suggestion that the NESS test makes it possible to resolve causal questions apart from policy considerations must be rejected. Wright's claim that the NESS test corresponds to intuitive judgments about causation is plausible, but surely that is because these intuitive judgments already have a great deal of "policy", that is, a way of seeing the world in terms of human interests, built into them.

115. PUTNAM, *Causal Structure*, *supra* note 110, at 87; *see also* H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 29 (2d ed. 1985).

116. PUTNAM, *Why There Isn't a Ready-Made World*, *supra* note 110, at 214.

background knowledge and our reason for asking the question."<sup>117</sup> Neither the interests that prompt the question nor the decision about what aspects of the event to regard as background conditions are "written into the physical system itself"<sup>118</sup> thus, there is no way to talk about causation which is independent of human interests.

If Putnam's account is correct for the sciences, it is a fortiori correct for the law.<sup>119</sup> Hart and Honoré's approach to causation is a good illustration of this point. They are tempted to define causation in terms of salience against some background conditions, but their own examples repeatedly show the inadequacy of relying on background conditions alone, without some reference to human interests. They are therefore driven to endorse a set of common sense principles, which are disconnected from a physical definition of cause and which preserve a special place for human agency.<sup>120</sup> Weinrib sometimes talks as if the causal link between the plaintiff and the defendant was something simply given by the real world.<sup>121</sup> But if Putnam, and Hart and Honoré, are correct, causation is not something that is just out there in the real world. Weinrib seems to recognize this point when he says that "wrongdoing serves to single out from among the numerous causal antecedents . . . the particular cause that is juridically significant."<sup>122</sup> The question for Weinrib, then, is whether Kantian right and its infringement can count as a human interest in the sense required for us to identify causes. My contention is that it cannot.

Recall the example of the forest fire discussed by Putnam and by Hart and Honoré. The Venusian will say that the fire was caused by the presence of oxygen in the atmosphere of this inhospitable planet, while the meteorologist may say that the fire was caused by unusually hot and dry weather. Many other causal statements about the fire are possible. Suppose the question is a legal one: was the camper's failure to put out his camp fire the cause of the forest fire? Now, it may seem obvious that it was, but that is only because we assume the presence of numerous background conditions (dry forests, oxygen in the air, absence of officials with a duty to extinguish campfires). Even in the presence

117. *Id.* at 214; see also HART & HONORÉ, *supra* note 115, at 35.

118. PUTNAM, *Causal Structure*, *supra* note 110, at 87.

119. Putnam suggests that historical causation is included in his account. *Id.* at 86; see also EDWARD H. CARR, WHAT IS HISTORY? 87-108 (1961). My exposition of Putnam's account of causation has emphasized the relativist, even post-modern, aspects of Putnam's thought, but Putnam claims that he is not a relativist and has resisted the post-modern label. See PUTNAM, MANY FACES, *supra* note 110, at 3-21; PUTNAM, *Causal Structure*, *supra* note 110, at 95; HILARY PUTNAM, WORDS AND LIFE 348-49 (James Conant ed., 1994).

120. HART & HONORÉ, *supra* note 115, at 49-50.

121. "Only when the harm materializes does this generality narrow to a particular victim and a particular injury." Weinrib, *Causation*, *supra* note 13, at 441.

122. *Id.* at 429-30.

of these conditions, we still need to ask why we single out the camper's omission, rather than any of the other things that happened, as the cause of the fire. Kantian right tells us to look at the camper's exercise of his free agency<sup>123</sup>—it provides a structure for the inquiry—but it cannot determine the answer to the question. The requirements of pure agency cannot count as a human interest for this purpose, because pure agency seeks to abstract from all such interests.<sup>124</sup>

According to Weinrib, it would be incoherent to ask whether the camper is ethically obliged to put out his fire, whether it is economically rational to require campers in general to put out fires, or whether communitarian considerations support a general duty to put out fires regardless of who started them. To answer the question of causation in terms of these human interests would make tort law subservient to some goal external to it (morality, economic efficiency, or communitarian values). Further, we cannot simply say that the mere fact of the camper's exercising (or not exercising) his agency is enough in itself. To impose liability every time any harm resulted from the exercise of agency would be to negate the very idea of agency.<sup>125</sup> The duties that are imposed by Kantian right are those that are required for the mutual consistency of everyone's agency.<sup>126</sup> However, there is nothing about this formal structure that can determine a causal question. Thus, Weinrib's approach yields no answer to the question of why we should attribute the cause of the forest fire to the camper, yet this attribution is crucial to a formalist analysis of the camper's liability in tort.

Thus far, the analysis seems to support Posner's approach. If a human interest is required to support a causal attribution, what is wrong with using wealth maximization or some other economic criterion? One answer might be that wealth maximization is simply a very implausible human interest for use in tort law. That answer is surely correct, but simply to substitute another human interest for wealth maximization does not undermine the realist insight of Posner's work. Rather, I suggest that tort law is not, and cannot be, subservient to any one human interest. Although reference to particular interests is required to make any statement about tort law, tort law is not tied to any particular interest, because it must deal with a potentially infinite range of human

---

123. KANT, *supra* note 67, at 56-58; HEGEL, *supra* note 67, ¶36.

124. KANT, *supra* note 67, at 42; HEGEL, *supra* note 67, ¶37.

125. WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 181. See also Weinrib's support for the reasoning of Cardozo J. over that of Andrews J. in the celebrated case of *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (N.Y. 1928); WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 164-67.

126. WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 94-100; KANT, *supra* note 67, at 56.



interactions. That is why, as we shall see in the next section, Posner finds it so hard to consistently apply his analysis of causation.

In our world, or at least on our continent, no-one would have any difficulty in saying that the camper's omission was at least one of the salient causes of the forest fire, nor would anyone hesitate to say that a rule requiring campers to use due care in putting out their fires was likely to be efficient. But in a world that was so damp that camp fires generally extinguished themselves, the camper's omission might not look like a legally significant cause. Rather than multiplying fantastic examples, I turn to some problematic tort cases to show both the realist dimension of Weinrib's formalism and the formalism of Posner's economic analysis.

#### *D. Examples from Tort Law*

In this section, I consider a number of cases in which the traditional "but for" test for causation is incomplete or problematic. The realism of Posner's economic analysis promises to explain these cases by linking the doctrines of causation to the Learned Hand formula. The formalism of Weinrib's approach promises to show that the cases can be assessed for coherence without reference to any particular human interest. My discussion is intended to suggest not that neither realism nor formalism can fulfill its promise, but rather that neither can do so without the other.

##### 1. Remoteness

In *Lamb v. Camden London Borough Council*,<sup>127</sup> the plaintiff's house was flooded and damaged when the defendant negligently breached a water main. After the plaintiff closed the house to await repairs, squatters moved in and were evicted. The plaintiff then had the house boarded up. However, more squatters moved in and, partly in retaliation for the plaintiff's cutting off services, damaged the house further.<sup>128</sup> Thus the damage to the plaintiff resulting from the defendant's negligent act was aggravated by the act of a third party, and the issue was whether the damage was too remote from the original act of negligence to be attributable to the defendant.

The most common method of assessing remoteness is to ask whether the intervening conduct is reasonable or unreasonable. In a typical formulation, an English authority states that "[i]f such [intervening] event is in the opinion of the court so unreasonable as to eclipse the original wrongdoing of the defendant,

---

127. *Lamb v. Camden London Borough Council*, [1981] Q.B. 625.

128. The facts are stated in the judgments of Lord Denning M.R. and Oliver L.J.. *Id.* at 633, 638.

then it will be regarded as a *novus actus* or *nova causa interveniens* [excusing the defendant from liability], but not otherwise."<sup>129</sup> If the intervening act is criminal or tortious, it is likely to relieve the defendant of further liability. Even if such acts are reasonably foreseeable, they are unreasonable (indeed, it is hard to see how the legal system could regard them otherwise). But a reasonable response, such as a rescue, is not considered to be a *novus actus interveniens*. Although a rescue is volitional, "in so far as such an act is reasonable, it does not eclipse the defendant's wrong in having created a danger."<sup>130</sup> Thus, a rescuer who suffers injury can recover from the tortfeasor. One way of looking at *Lamb*, then, is to ask whether the second invasion of squatters, though reasonably foreseeable, was "reasonable."

Lord Denning M.R. approached the question in classic realist fashion, that is, by not answering it. "The truth is that . . . duty, remoteness and causation . . . are all devices by which the courts limit the range of liability. . . ."<sup>131</sup> He therefore decided the case without exploring the conceptual structure of any of them, and, in particular, without asking himself about the reasonableness of the intervening act. He held for the defendant, on two grounds which he referred to as matters of policy. First, it was the plaintiff's responsibility to keep the squatters out, indeed, "[i]t has never been suggested in the pleadings or elsewhere that it was the job of the [defendant]."<sup>132</sup> Second, the plaintiff ought to be insured against theft and malicious damage, so that her loss might be "spread throughout the community. . . . If she was not insured, that is her misfortune."<sup>133</sup>

Watkins L.J. also held for the defendant. He agreed with Lord Denning M.R. that the damage was reasonably foreseeable, but he held that it was too remote (or, in other terms, that the borough's negligence was not the proximate cause of the damage).<sup>134</sup> His approach was to consider the relationship between the concept of remoteness and the facts of the case:

. . . the very features of an event or act for which damages are claimed themselves suggest that the event or act is not on any practical view of it remotely in any way connected with the original act of negligence. These features will include such matters as the nature of the event or act, the time it occurred, the place where it occurred, the

---

129. CLERK & LINDSELL ON TORTS ¶1-118 (R.M.W. Dias ed., 16th ed. 1989).

130. *Id.* ¶1-123; see also HART & HONORÉ, *supra* note 115, at 147-48.

131. *Lamb v. Camden London Borough Council*, [1981] Q.B. 625, 636.

132. *Id.* at 637.

133. *Id.* at 637-38.

134. The third judge, Oliver L.J., held that the damage was not reasonably foreseeable, so no issue of remoteness arose. *Id.* at 641-43.

identity of the perpetrator and his intentions and responsibility, if any, for taking measures to avoid the occurrence and matters of public policy.

. . . I have the instinctive feeling that the squatters' damage is too remote . . . although on the primary facts I, too, would regard that damage or something like it as reasonably foreseeable . . .<sup>135</sup>

He therefore looked at "the features of the injurious act"<sup>136</sup> and concerned himself precisely with its reasonableness:

We are here dealing with unreasonable conduct of an outrageous kind. It is notorious that squatters will take the opportunity of entering and occupying any house, whether it be damaged or not, which is found to be unoccupied for more than a very temporary duration. In my opinion this kind of anti-social and criminal behaviour provides a glaring example of an act which inevitably, or almost so, is too remote to cause a defendant to pay damages for the consequences of it.<sup>137</sup>

The extreme criminality of the intervening act, then, is one of the factors "deemed relevant" in "the construal of . . . the relationship between the parties." Indeed, the criminality of squatting must have been a decisive factor, as it is the only one with which Watkins L.J. actually dealt.

The mutual dependence of realism and formalism can be seen through a closer look at Weinrib's and Posner's analyses of *Lamb*. Consider first Weinrib's reasons for preferring the judgment of Watkins L.J. Weinrib argues that we (the legal community) should evaluate the decision by its coherence with the appropriate form of justice. Since it is a tort action, the appropriate form is corrective justice, and so the focus should be on the relation of the parties as doers and sufferers of harm. Watkins L.J.'s judgment is to be preferred because it does not rely on the inevitably political question of loss-spreading but on "the *most plausible* construal of the relationship between the parties in light of the factors that are *deemed relevant*."<sup>138</sup>

However, recall that Watkins L.J.'s judgment depends on his characterization of squatting; it is unreasonable because it is extremely criminal, and thus constitutes a *novus actus interveniens*. This characterization of squatting as an "outrageous" criminal act is neither uncontroversial nor

135. *Id.* at 647.

136. Weinrib, *Legal Formalism*, *supra* note 7, at 1007.

137. *Lamb v. Camden London Borough Council*, [1981] Q.B. 625, 647.

138. Weinrib, *Legal Formalism*, *supra* note 7, at 1007 (emphasis added).

apolitical. It is arguable that squatting should be encouraged as it provides shelter to the homeless, utilizing housing stock that would otherwise lie idle. Thus, squatting might be more in the nature of a rescue than of a crime. Damage caused by squatters would then be regrettable, but a perfectly understandable consequence of an otherwise valuable activity. Thus, Watkins L.J.'s decision to deny liability does not spring from the "very features of the act" because there are no "very features." His decision to characterize squatting as criminal rather than as beneficial, and thus to refuse to recognize the defendant's negligence as the cause of the loss, is as much a policy decision as Lord Denning M.R.'s.<sup>139</sup> Thus, because there is no unique way—more importantly, no morally neutral way—to characterize the factors that are deemed relevant, Watkins L.J.'s judgment imports as much politics as Lord Denning M.R.'s; if the one judgment is incoherent, so is the other. If Weinrib's assessment of the coherence of the judgment depends on the plausibility of Watkins L.J.'s inherently political judgment about the value of squatting, then formalism depends on realism, in the sense that political judgment cannot be excluded from the assessment of coherence.

Weinrib's first response to this argument might run as follows. Given Watkins L.J.'s characterization of squatting, his judgment is coherent. If his characterization of squatting were different, his conclusion might differ, but his approach would still cohere with the form of corrective justice that is inherent in tort law. Formalism does not pretend to dictate the result of every case. Rather it is the coherence of the result of this particular case with which the whole of tort law is in issue. This response is Weinrib's defense against the third door to contingency discussed above. But this response represents a big concession to realism, as it illustrates the great distance between Kantian right and particular legal doctrines. If not just the result, but the coherence, of any particular adjudication depends on a contingency (such as the characterization of squatting as criminal rather than as a rescue) then formalism is silent without realism.

A second, related response might be that I have misstated what Weinrib means by "political." A "political" decision, in his terminology, is not one which depends on contested social meanings or controversial characterizations of social facts, but one which introduces extrinsic goals into the non-instrumental

---

139. Watkins L.J.'s doctrinal room to maneuver was limited by *Southwark London Borough Council v. Williams*, [1971] 1 Ch. 734, where the Court of Appeal refused to recognize a plea of necessity where a squatter entered an empty house owned by a local housing authority. However, *Williams* does not make the rescue characterization impossible. While rejecting the plea of necessity, Edmund Davies L.J. expressed his sympathy for "the dreadful plight of a certain number of homeless families" and urged the Borough to assist them by adopting an arrangement that had been made between another London borough and a squatters' association. *Id.* at 746-47.

process of adjudication:

Private law may have political consequences and may be the result of a political decision to establish the appropriate institutions of adjudication, but *qua* realization of corrective justice, it has no political aspect. The parties to a transaction are active and passive with respect to a single harm; the significance of their interaction lies not in the specification by political authority of a collective external goal but in the interpretation of the immediate intersection of doing and suffering as each party pursues her own goal.<sup>140</sup>

On this conception of politics, Lord Denning M.R.'s judgment in *Lamb* is political, because it derives from the judge's views the appropriate social arrangements for loss sharing (explicitly, that people should have insurance, and implicitly that it should be the homeowner's insurance for criminal acts rather than the municipality's tort liability insurance which pays).<sup>141</sup> In contrast, Watkins L.J.'s judgment is not political because it "does not attempt to achieve any goal external to the relationship between plaintiff and defendant."<sup>142</sup>

If Watkins L.J.'s characterization of squatting is as important as I have suggested, then it would appear that his judgment, though it does not attempt to *promote* any external goal, depends as much as Lord Denning M.R.'s on *assessment* of the desirability of an extrinsic social goal.<sup>143</sup> My point is not that Watkins L.J.'s judgment is incoherent or that it is not to be preferred to Lord Denning M.R.'s, but the point is that to achieve coherence in Weinrib's sense, something political must be taken to be non-political. Formalist assessments of coherence are themselves contingent. In any event, if by "political" Weinrib means only the mixing of corrective and distributive justice, then he has a narrow meaning of the word, a meaning which gives less content to his claim that private law is non-political than one might have expected.

So far, Posner would be comforted. Without explicitly endorsing Lord Denning M.R.'s analysis, Posner plainly prefers its policy-oriented approach. He argues that Watkins L.J.'s "approach has no analytical content; it is a visceral mixing of incommensurables," and it represents "uncabined judicial

140. Weinrib, *Legal Formalism*, *supra* note 7, at 992.

141. *Id.* at 1006.

142. *Id.*

143. The argument that the extrinsic social goal enters through Watkins L.J.'s characterization of squatting as a harm rather than a benefit is appealing but not successful because it is extremely implausible to assert that squatting, even if socially beneficial, was a benefit to the plaintiff. My argument concerns, rather, Watkins L.J.'s assessment of the nature of the harm.

discretion.”<sup>144</sup> Posner suggests instead that “[e]conomic and philosophical approaches to causation expose the poverty of conventional legal thinking on a matter of central concern to the legal system, that of the scope of liability for wrongful conduct, and point the way to a more satisfactory solution.”<sup>145</sup> Posner does not specify this solution, but it can easily be discerned from Lord Denning M.R.’s reasons. Since Lamb can, as compared with the defendant, avoid the loss at less cost and more cheaply insure against it, wealth maximizing suggests that she should have the incentive to avoid it, and hence the liability for it. If coherence depends on contingent judgments of plausibility, then the field would appear to be wide open to economic considerations. Yet the need for Posner to choose a form to represent the transaction between the plaintiff and the defendant implies that the judgment cannot be shown to support economic efficiency on all assumptions.

Ask what hypothetical market transaction is under consideration in *Lamb*. Recall that a hypothetical market transaction is one which would be justified on wealth-maximizing grounds, but which is blocked by high transaction costs.<sup>146</sup> To hold for the plaintiff, on this view, is to hold that there should have been a contract between the plaintiff and the defendant which specified that in the event of flooding the plaintiff’s house, the defendant would not only repair the house but would also protect the plaintiff’s property from third parties while it was being repaired. The defendant, in other words, being in the best position to prevent the flooding, would assume the risk of all reasonably foreseeable damage. However, the contract for some reason could not be made. To hold for the defendant is to hold that, once flooding has occurred (for which the defendant remains liable), the contract should have left the plaintiff to avoid the trespass. Under this decision, the economic analyst normally speculates about the relevant empirical magnitudes, but since “a court can make a reasonably accurate guess as to the allocation of resources that would maximize wealth,”<sup>147</sup> we are entitled to assume that the English Court of Appeal got it right in *Lamb*.

Posner’s interpretation of *Lamb* purports to be instrumental, as Weinrib would point out, but at the same time, it does presuppose a certain relationship between the parties which explains why they are in this lawsuit. They are related, not as the doers and sufferers of harm, but as the participants in a hypothetical market transaction. If the contract referred to above were made, the defendant would give up the right to a certain amount of carelessness in repairing sewer lines, while the plaintiff would obtain protection from damage

---

144. POSNER, *Neotraditionalism*, *supra* note 16, at 447.

145. *Id.*

146. POSNER, *Utilitarianism*, *supra* note 10, at 62-63.

147. *Id.* at 62.

by third parties in the event of flood. The court's refusal to approve this hypothetical contract is evidence that, in the absence of transaction costs, the contract would not have been made. The expected value of the protection would have been less than the benefit to the defendant of the additional carelessness, so that the plaintiff would never have been able to meet the defendant's terms. Thus, *Lamb* and the Borough are related by the market form of justice.

It appears that *Lamb* can be explained in terms of either of the court's two roles, as a tribunal of efficiency or as a promulgator of incentives. However, the rule reinforced by *Lamb* is not "least cost avoiders should bear liability" but "tortfeasors are not liable for third parties' unreasonable acts that aggravate the initial damage." This rule, if applied in circumstances where squatting was economically justified, would *prevent* wealth from being maximized. Posner argues that trespass to obtain shelter is a hypothetical market transaction when the trespasser's willingness to pay is sufficient to compensate the property owner, but transaction costs prevent the transaction from occurring. The legal system's reluctance to allow such trespass is explained by the assumption that these conditions will rarely be met.<sup>148</sup> Suppose the conditions were met in *Lamb*. Application of the rule of remoteness in *Lamb* would then give people a greater incentive to prevent squatting. However, if each case is assessed on the merits of the squatters' economic claim, by looking at their economic characteristics, *Lamb* would have no value as a precedent. Imposing the form of the hypothetical market transaction on the parties cannot ensure that the wealth-maximizing goal is in fact achieved.

Posner would no doubt respond that this argument is built on implausible assumptions. For example, in *Lamb*, there was communication between the plaintiff's agents and the squatters, so the transaction costs of arranging a rental (presumably illegal, given the condition of the house) would have been low. In other words, an actual market transaction would have materialized, and the plaintiff's claim against the defendant for the squatters' damage would never have arisen. But the general point remains. The court's role as a promulgator of incentives is only accidentally compatible with its role as a judge of efficiency as between the parties. Posner's attempt to fit all interactions into a particular form does not serve the goal with which he begins. To remain true to hypothetical market analysis, he must give up the instrumentalism that is supposed to characterize economic analysis, and rely instead on a common sense notion of cause that is not merely a reflex of underlying wealth-maximizing values.

---

148. POSNER, *ECONOMIC ANALYSIS*, *supra* note 8, at 239.

## 2. Unidentified Tortfeasors

In the celebrated case of *Summers v. Tice*,<sup>149</sup> two hunters—I shall call them A and B—negligently shot at a quail and struck the plaintiff, who lost his right eye. The shot was fired by one of two hunters, but it was impossible to determine which hunter fired the shot.<sup>150</sup> No one doubts that if the trier of fact could determine that the shot had been fired by B and not A, only B would be liable. Call this fact situation “the *Summers* variant.” Although both A and B were negligent, A’s negligence did not cause the plaintiff’s injury. The defendants in *Summers* argued that since the plaintiff could not prove that either of them caused the injury, neither of them should be liable. But this conclusion seems repugnant. As between the innocent plaintiff and the negligent defendants, it seems fair that the defendants should bear the loss. The court reached this result by placing the burden of proof regarding causation on the defendants:

When we consider the relative position of the parties and the results that would flow if the plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers—both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can.<sup>151</sup>

If either hunter could prove that it was not his bullet that hit the plaintiff, he could convert *Summers* into its variant and avoid liability.

The holding in *Summers* is dangerous to Weinrib’s view of tort law, provided it entails a relaxation of the causation requirement. Weinrib, however, explains *Summers* as an evidentiary ruling which shifts the burden of proof regarding causation without abandoning the requirement of causation.<sup>152</sup> Yet, this ruling is not required by formalism. The result urged by the defendants is just as coherent in formalism as the result the court achieved,<sup>153</sup> and some of the court’s reasoning is, in Weinrib’s view, illegitimate. While practical

---

149. 199 P.2d 1 (Cal. 1948).

150. The “shot could not have come from the gun of both defendants. It was from one or the other only.” *Id.* at 3.

151. *Id.* at 4.

152. WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 154-55.

153. There seems to be no formalist argument against Hogan’s view that the defendants in *Summers v. Tice*, 199 P.2d 1 (Cal. 1948), and in *Cook v. Lewis*, 1951 S.C.R. 830, should not have been liable. See T. Brian Hogan, *Cook v. Lewis Re-examined*, 24 MOD. L. REV. 331 (1961).



arguments about who is better positioned to gather evidence may be acceptable,<sup>154</sup> the court's emphasis on the comparative innocence of the plaintiff is the sort of consideration which Weinrib's formalism says is incoherent.

If *Summers* and its variant are difficult for Weinrib to explain, they are ultimately impossible for Landes and Posner to explain. Their argument against liability for A in the variant is that hunters in general would take too much care if they were liable in these situations. Accordingly,  $p|v - p|n$  is zero where the negligent hunter's shot does not hit the plaintiff, but hunters would take extra care to avoid liability in these situations. Posner supports the result in *Summers* itself on the following grounds: "If neither party will know whether his bullet has struck the victim, we want each party to avoid shooting carelessly (to take due care). The case is thus one of joint care, and a rule of joint liability . . . is the correct rule in such a case."<sup>155</sup> If we know who fired the bullet that injured the plaintiff, we also know that additional care by that person would not have avoided the plaintiff's injury; therefore, it is counterproductive to impose liability on that person. On the other hand, if we don't know who fired the bullet,  $p|v - p|n$  might be positive, so we want both hunters to be equally careful. Therefore, it is efficient to impose liability on both.

While Posner's argument appears to render causal questions meaningless by treating the causal inquiry as just another form of the inquiry as to efficient liability rules, his argument depends as much as Weinrib's argument on the view that causation is given by the world. A pure policy approach would use the fact that  $p|v - p|n$  is significantly positive *ex ante* to justify labelling the defendant's behavior the cause of the injury, but Posner is implicitly relying on traditional causal notions to conclude *ex post* that  $p|v - p|n$  was significantly positive *ex ante*. We cannot know *ex ante* whether a particular factual situation will have an information problem of the sort in *Summers* or not. Thus, *ex ante*, we cannot distinguish *Summers* from its variant by examining the value of  $p|v - p|n$ .

If we know that a defendant's bullet did not hit the plaintiff, then we know *ex post* that, *in this case*, additional units of care would not have prevented the plaintiff's injury, but that is not at all the same thing as saying that *ex ante*  $p|v = p|n$ . On the one hand, if it were true *ex ante* that the conditional probabilities were equal, then neither hunter in *Summers* should be liable. On the other hand, if it were true *ex ante* that  $p|v - p|n$  was positive, then to

---

154. "Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury." *Summers v. Tice*, 199 P.2d at 4; *cf. Cook v. Lewis*, 1951 S.C.R. at 835 (Rand J.) (" . . . the negligent actor has culpably participated in the proof-destroying fact").

155. LANDES & POSNER, *supra* note 94, at 212.

exonerate hunter A in the *Summers* variant would reduce the incentives for hunters to take care in the future; both would be liable in *Summers* and in its variant. These rules may seem absurd, but they are more consistent with the underlying concern for efficiency than what Landes and Posner actually assert. The distinction they seek to assert, precisely because it is *ex post*, cannot distinguish the incentives that the hunters face *ex ante*, and therefore on this theory they cannot distinguish their liability. To explain the case law as it stands, then, Landes and Posner are driven back to case-specific considerations owing more to Weinrib's view that causation is required to connect the plaintiff to the defendant (though, of course, Landes and Posner are assessing the connection in the light of a very different moral theory). Landes and Posner's explanation of the defendants' liability in *Summers* is formalist in that it retrospectively fits the facts into the market form, rather than prospectively considering the effect of the judgment on incentives to take care.

### 3. Joint Tortfeasors

In *Brooke v. Bool*,<sup>156</sup> the defendant owned a shop next to his residence. He let the shop to the plaintiff. They arranged "that the defendant should have a right to enter the shop at night after the plaintiff had gone in order to see that it was secure . . . ."<sup>157</sup> One night Morris, who lodged in the defendant's premises, told the defendant that he thought he smelled gas coming from the plaintiff's shop. The two men entered the shop and investigated a gas pipe.

The defendant examined the lower part of the pipe with a naked light, lit the burner, and, finding that nothing happened, turned the burner out again. Mr. Morris, who was much younger than the defendant, then got up on the counter and examined the upper part of the pipe, also by means of a naked light. A violent explosion followed, which, besides injuring Morris, did considerable damage to the shop and its contents . . . .<sup>158</sup>

Thus the defendant and Morris were equally negligent, and negligent in the same way, but on traditional causal principles, it was Morris, not the defendant, who caused the explosion.

Nevertheless, the court held the defendant liable on three distinct grounds, the third being of particular interest for this paper. The court held that Morris and the defendant were joint tortfeasors: ". . . the defendant was responsible on the ground that the enterprise in which he and Morris were engaged was the

---

156. [1928] 2 K.B. 578 (C.A.).

157. *Id.* at 578-79.

158. *Id.* at 579.

joint enterprise of both, and that the act which was the immediate cause of the explosion was their joint act done in pursuance of a concerted purpose."<sup>159</sup> The court distinguished joint tortfeasors from those who independently cause the same sort of damage.<sup>160</sup> If the defendant and Morris had independently entered the plaintiff's shop and independently performed the same negligent act, only Morris would be liable, because the explosion resulted from his act, not the defendant's.

The court did not explain why the causation requirement should be dispensed with in cases of joint torts. In addition, the American cases, many of which involve unlawful automobile racing,<sup>161</sup> do not provide any further assistance. In circumstances where two parties are somehow co-operating or assisting each other in a course of conduct which results in a tort, courts assume that it is appropriate to hold all the participants liable, even if only one "caused" the injury in the traditional sense. Some assistance may be obtained from *Cook v. Lewis*,<sup>162</sup> where the Supreme Court of Canada considered a factual pattern essentially identical to *Summers*. Before reaching the same result as in *Summers*, the court rejected the plaintiff's argument that the two hunters were joint tortfeasors:

Can it be said that the facts of the case at bar fall within the definition of joint tortfeasors, . . . "two persons who agree on common action in the course of, and to further which, one of them commits a tort?" It is argued that [the defendants] agreed on common action, that is to go out hunting together and to divide the bag, and that it was in the course of this and in furtherance of it that the shot which injured the plaintiff was fired by one or other of them . . . . [A]pplying this definition to the . . . case at bar . . . would bring about the result that every member of a party going out together, with a lawful common object, social or sporting, which could be carried out without negligence, would be vicariously liable for the negligence of any member of the party.<sup>163</sup>

The court noted that there was no relationship of agency, partnership, or employment between the hunters, and that "[n]either appears to have assisted or

159. *Id.* at 585.

160. *See* *The Koursk*, 1924 P. 140 (C.A.).

161. *Agovino v. Kunze*, 5 Cal. Rptr. 534 (Cal. Ct. App. 1960).

162. The court, though declining expressly to adopt all of the reasoning in *Summers*, reached the same result (i.e., that on these facts, for reasons of fairness, the burden of proof on causation should shift to the defendants). *Cook v. Lewis*, 1951 S.C.R. 830, 842 (quoting from *Summers v. Tice*, 199 P.2d 1,4 (Cal. 1948)).

163. *Cook v. Lewis*, 1951 S.C.R. at 841.

encouraged the other to commit a breach of any duty owed to the plaintiff."<sup>164</sup>

This reasoning suggests that the decision to waive the traditional causation requirement for joint torts depends on the moral quality of the joint action that is alleged to constitute the joint tort. It would explain why the courts have no difficulty imposing joint liability in the automobile racing cases. This type of racing is unlawful and anti-social in any event, regardless of whether damage or injury results; thus it seems natural to hold all the racers liable for the damage incurred by any one of them.

But this reasoning is quite alien to Weinrib's formalism. It seems difficult, on his view of causation, to impose liability for encouraging someone to behave negligently or for participating in an activity that turns out to be negligent, when there is no liability for the negligence itself because that negligence had no consequences. Weinrib must say either that these cases are wrongly decided or that they constitute an exception to the principle of causation. Yet there seems to be nothing in his theory of causation that would justify this exception. The absence of a link between plaintiff and defendant should preclude liability. The causation requirement "prevents the litigation from being transformed into a general comparative survey of the moral qualities and defects of the litigants."<sup>165</sup> Yet it is precisely some moral quality that seems to justify liability in the case of joint torts. Cartwright J.'s reasons, sketchy as they are, supports this point: innocent pursuits are not to be discouraged, but the promotion of tortious acts should be discouraged. Yet it is precisely this sort of reasoning that Weinrib seeks to exclude from adjudications in tort.

#### 4. Liability Despite Disproof of Traditional Cause

Between 1941 and 1971, the drug diethylstilbesterol (DES) was manufactured and marketed to prevent miscarriages. In 1971, the drug was banned for this purpose, because it was discovered that DES could cause cancer in women whose mothers took DES during pregnancy. A plaintiff who sued the manufacturers of DES faced a serious evidentiary problem: because of the lapse of time, it was generally impossible to establish which defendant had manufactured the particular pill taken by the plaintiff's mother. American courts adopted a number of different solutions to this problem. One solution was simply to uphold traditional causal rules and to deny liability where the plaintiff

---

164. *Id.* at 841; *contra Orser v. Vierra*, 60 Cal. Rptr. 708 (Cal. Ct. App. 1967) (regarding a similar fact situation in which the encouragement of one defendant, who did not shoot at the plaintiff, raised an issue of liability precluding summary judgment in his favour).

165. Weinrib, *A Step Forward*, *supra* note 108, at 518.

could not identify the appropriate manufacturer.<sup>166</sup> Another was to hold each defendant "liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries."<sup>167</sup> At one level, this solution simply extends the logic of *Summers* and *Cook*. As Weinrib puts it, "[t]o the extent that these cases still allow defendants to exculpate themselves by disproving their causal role, they merely modify the evidentiary mechanisms regarding causation without negating its systemic importance for tort liability."<sup>168</sup> At another level, this solution is a radical departure from traditional principles, particularly in holding that each defendant's liability would be several only, so that plaintiffs would not necessarily recover all their damages.<sup>169</sup> The logic of the market share rule for allocating several liability in the DES cases suggests that a manufacturer should be held liable even if it can show that the particular plaintiff's mother did not take its product. This was the solution adopted in *Hymowitz v. Eli Lilly and Co.*<sup>170</sup>

Weinrib's objection to the reasoning in *Hymowitz* must be twofold.<sup>171</sup> First, the judgment is incoherent because it quite consciously implements a scheme of distributive justice in the context of a tort action, which should be an

166. *Tidler v. Eli Lilly & Co.*, 851 F.2d 418 (D.C. Cir. 1988); *Wood v. Eli Lilly & Co.*, 38 F.3d 510 (10th Cir. 1994); *Morton v. Abbott Lab.*, 538 F. Supp. 593 (M.D. Fla. 1982); *Pipon v. Burroughs-Wellcome Co.*, 532 F. Supp. 637 (D.N.J. 1982); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004 (D.S.C. 1981); *Mizell v. Eli Lilly & Co.*, 526 F. Supp. 589 (D.S.C. 1981); *Gray v. United States*, 445 F. Supp. 337 (S.D. Tex. 1978); *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324 (Ill. 1990); *Payton v. Abbott Lab.*, 437 N.E.2d 171 (Mass. 1982); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984); *Naum v. Charles E. Frosst & Co., Inc.*, 427 A.2d 1121 (N.J. Super. Ct. App. Div. 1981); *Gorman v. Abbott Lab.*, 599 A.2d 1364 (R.I. 1991).

167. *Sindell v. Abbott Lab.*, 607 P.2d 924, 937 (Cal. 1980), *cert. denied*, 449 U.S. 912; *see also Conley v. Boyle Drug Co.*, 570 So. 2d 275 (Fla. 1990); *Martin v. Abbott Lab.*, 689 P.2d 368 (Wash. 1984); *Collins v. Eli Lilly & Co.*, 342 N.W.2d 37 (Wis. 1984), *cert. denied sub nom. E.R. Squibb & Sons, Inc. v. Collins*, 469 U.S. 826 (1984). The theory of liability invoked in *Sindell* is often traced to Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 *FORDHAM L. REV.* 963, 978-94 (1978); *Sindell*, 607 P.2d at 937. Sheiner suggested two other bases of liability, concert of action and alternative liability (as in *Summers*), that have generally been rejected in DES cases. *Sindell*, 607 P.2d at 928-33; *Conley*, 570 So. 2d at 280-81; *Martin*, 689 P.2d at 375-79; *Collins*, 342 N.W.2d at 45-46. Sheiner, 46 *FORDHAM L. REV.* at 999-1000, also argued that manufacturers who could not disprove causation should be jointly and severally liable for the plaintiff's full damages. This suggestion has also generally been rejected. *See infra* note 169 and accompanying text.

168. WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 154-55; *but see Brown v. Superior Court*, 751 P.2d 470, 486-87 (Cal. 1988) (explaining that the *Sindell* court intended to implement a scheme that would be fair to all defendants).

169. *Brown*, 751 P.2d at 486-87; *Martin*, 689 P.2d at 380-83; *McCormack v. Abbott Lab.*, 617 F. Supp. 1521 (D. Mass. 1985).

170. 539 N.E.2d 1069 (N.Y. 1989).

171. Although Weinrib has not made these objections in published writing, I am attributing them to him because they are implicit in his theory of tort law and in his first-year tort lectures.

instance of corrective justice. The court adverts to the effect that the judgment will have on "nearly 500 similar actions pending in the courts in this State."<sup>172</sup> The court thus fashioned a theory of liability that was designed to do justice among *all* the DES plaintiffs and *all* the drug manufacturers, rather than between Mindy Hymowitz and the particular manufacturers that she sued. Second, the court abandoned the traditional causation requirement, which was the link between the plaintiff and the defendant. Indeed, it is precisely because the court abandoned traditional causation that it was able to fashion a theory of liability that owed more to distributive than to corrective justice. For Weinrib, the theory of *Hymowitz* poses a major threat to the coherence of tort law. The judgment threatens to hold people liable because of their general moral character for the purpose of achieving distributive goals, rather than because they wronged the plaintiff.

But did the court in *Hymowitz* abandon the requirement of cause? As we have already seen, common law courts impose liability without cause on joint tortfeasors, and no one doubts that if the DES defendants could have been persuasively described as acting in concert or as jointly controlling the risk, they would have been jointly and severally liable without the market share theory. We have also seen that the world does not tell us whether a particular event is or is not the cause of another event. We use the word "cause" to specify events that seem to us, because of our interests, to have a salient connection to the event to be explained. Further, Weinrib's theory of tort law does not appear to demand any particular substantive theory for defining causes. Causation is important only because it provides a link between the plaintiff and the defendant. Therefore, I re-examine the facts of the DES litigation to suggest that some version of the market share solution adopted in *Hymowitz* can be re-described in terms that make it coherent with Weinrib's theory of tort law. This re-description will bring into sharp focus the dependence of formalism on realism.

I continue to assume that Weinrib's account of the function of the causation requirement in tort law is basically correct. Thus, the first problem to be faced in re-describing the DES litigation is to distinguish it from the *Summers* variant, because it seems natural to exonerate hunter A of civil liability if he can prove that his bullet did not strike the plaintiff. In contrast, the theory of *Hymowitz* does not exonerate drug company A. The most plausible distinction would run as follows. In the *Summers* variant, we are satisfied that if B's bullet had not struck the plaintiff, neither would A's. Thus we are comfortable saying that B, not A, caused the injury. However, in the DES litigation, we are confident that if the plaintiff's mother had not received a pill from manufacturer B (or C or D), she would have received one from A. That is why the courts in the DES

---

172. *Hymowitz*, 539 N.E.2d at 1071.

cases have placed such emphasis on the generic quality and fungibility of DES,<sup>173</sup> and why they have been tempted to redefine the injury as risk of injury rather than actual injury.

It may be objected that all this argument shows is that it is logically possible to distinguish the *Summers* variant from *Hymowitz*. But this distinction shows more: it is possible to describe A's wrongdoing as the cause of the plaintiff's injury, for if B's (or C's or D's) product had not injured the plaintiff, A's surely would have. A's liability resembles the liability of one of several sufficient wrongdoers, or the liability of a joint tortfeasor, that is, one whose liability is not the cause of the plaintiff's injury in the traditional "but for" sense, but who is nonetheless liable. It may be further objected that this re-description of the causal connection between the DES plaintiffs and drug manufacturer A is implausible. But in a sense, that is precisely my point. We need a reason to say that this re-description is or is not implausible to determine whether there is a link between the plaintiff and A which is sufficient to qualify as a cause and thus make A liable. The re-description in itself does not provide that reason. But neither does Weinrib's formalism because it provides no criteria for determining when a particular empirical connection counts, or does not count, as a causal link. It is not enough for Weinrib to say that *Hymowitz* is wrongly decided because the defendant could disprove causation. Weinrib must argue that the connection between the plaintiff and the defendant is too tenuous to count as a cause. Formalism provides no resources for this argument. Even worse for formalism, the argument can only be conducted in terms of those human interests that formalism seeks to exclude.<sup>174</sup>

Courts which have provided relief to DES plaintiffs have uniformly pointed to the comparative innocence of the plaintiffs over the defendants, and to the defendants' generally superior ability to absorb the loss in question.<sup>175</sup> Of these justifications only the first, and not the second, would apply to hunter A in the *Summers* variant. However, Weinrib expressly rules out both of these

---

173. *Sindell v. Abbott Lab.*, 607 P.2d 924, 926 (Cal. 1980); *Hymowitz*, 539 N.E.2d at 1072; *Collins v. Eli Lilly Co.*, 342 N.W.2d 37,44 (Wis. 1984); Sheiner, *supra* note 167, at 992-93.

174. Sheiner's theory of liability also rested on a re-description of the causal link. She argued that the plaintiff should be required to prove "an insufficient industrywide safety standard," which would then serve as a rationale for relaxing the traditional causation requirement: "Each defendant's adherence perpetuates this standard, which results in the manufacture of the particular, unidentifiable injury-producing product. Therefore, each industry member has contributed to the plaintiff's injury." Sheiner, *supra* note 167, at 997.

175. *Sindell*, 607 P.2d at 936; *Hymowitz*, 539 N.E.2d at 1075; *Collins*, 342 N.W.2d at 49; Sheiner, *supra* note 167, at 1002.

justifications as possible arguments in tort cases.<sup>176</sup> Posner supports the result in *Sindell* as analogous to *Summers*,<sup>177</sup> but Weinrib would take the wealth-maximizing goal of the incentive-based account as an external goal that cannot coherently be brought into tort law. Other substantive moral arguments for making manufacturer A, but not hunter A, liable are possible, but Weinrib would have to reject them all. Yet, without an argument tied to some human interest, it is difficult to see how manufacturer A's conduct can be described as causing, or indeed as not causing, the plaintiff's injury. Thus formalism cannot determine, and more importantly, cannot permit the court to determine, what is the cause of any given injury.

If this argument is possible, it answers only the second of Weinrib's objections to *Hymowitz*. The first, the argument that the DES cases incoherently mix elements of corrective and distributive justice, remains. Even if there is a causal connection between the plaintiff and the defendant, the court in a tort action is supposed to confine its attention to the parties and not to seek a general redistributive solution to a political problem. I suggest that it is here that Weinrib's conception of form does constrain the court. While considerations of human good and human purposes cannot be rigorously excluded from tort adjudication, it is not possible for tort law to do everything. In the DES litigation, the tort system cannot be expected to implement corrective justice between the parties and to implement distributive justice among all defendants. This problem is apparent in *Hymowitz* where the court, despite relaxing the causation requirement in a way that I have argued is consistent with corrective justice, contemplates the prospect that some plaintiffs will not recover fully. The justification for this ruling is purely distributive. "[W]e eschewed exculpation to prevent the fortuitous avoidance of liability, and thus, equitably, we decline to unleash the same forces to increase a defendant's liability beyond its fair share of responsibility."<sup>178</sup> The uncomfortable fit of this ruling with the reasonable expectations of successful tort plaintiffs and with the logic of corrective justice suggests another solution: joint and several liability with inflation of shares, with individual defendants being permitted to exculpate

---

176. WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 30, at 36-38 (discussing loss-spreading). "Tort law is not interested in the defendant's culpability aside from the plaintiff's entitlement to redress." *Id.* at 155.

177. POSNER, *ECONOMIC ANALYSIS*, *supra* note 8, at 183. LANDES & POSNER, *supra* note 94, at 213, offer an example in which the reasoning of *Hymowitz* would lead to all manufacturers taking no precautions. But their example, as they recognize, does not amount to a general argument against this approach.

178. *Hymowitz*, 539 N.E.2d at 1078.



themselves.<sup>179</sup> If the theory of the causal link that I have advanced is possible, this solution is as consistent with Weinrib's formalist account of tort law as the denial of liability.

## V. CONCLUSION

The choice of a form imposes a structure on legal analysis; some arguments fit the structure better than others, but the form itself does not provide these arguments. Weinrib's formalism provides a structure for thinking about questions of causation, and that structure attaches a particular importance to human agency in the abstract. But this formalism does not provide any arguments for deciding whether a particular human act should count as a cause. Those arguments must come from the realm of specific human interests, that is, from policy, the contingency which Weinrib seeks to exclude. In contrast, Posner's realism purports to show that the concept of causation has no independent force in legal argument. Rather, it merely stands for a certain class of instrumental arguments. But in trying to explain the case law, Posner continually falls back on a formal conception of how the parties are related, and in this conception, the idea of cause does have an independent function. Thus, formalism and realism are interdependent; what divides Posner and Weinrib—what generally divides realists and formalists—is not method, but substantive moral beliefs.<sup>180</sup>

Many legal scholars like to illustrate their arguments with examples drawn from sports and games.<sup>181</sup> I have resisted this temptation to this point, but I will conclude with a formalist's and a realist's thoughts about baseball's designated hitter (DH) rule. This rule permits a team to substitute for any defensive player (normally its pitcher) another player, the designated hitter, in its batting order. If the designated hitter takes a fielding position, the player in

---

179. This solution is merely Sheiner's original proposal. Sheiner, *supra* note 167, at 991-1000. Compare William D. Wilson, *Market Share Liability—Did New York Go Too Far?*, 64 ST. JOHN'S L. REV. 363, 376 (1989) (arguing on policy grounds that defendants who cannot exculpate themselves should be severally liable, but that their shares of liability should be adjusted upwards to ensure full recovery). I am not aware of anyone having argued that the defendants' liability should be inflated to ensure full recovery where exculpation is not permitted.

180. Thus, it is no coincidence that in addition to criticizing Posner's method, Weinrib rejects Posner's substantive moral theory. See Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472, 477 (1987); Weinrib, *Utilitarianism*, *supra* note 23.

181. Examples include STANLEY FISH, *Dennis Martinez and the Uses of Theory*, in *DOING WHAT COMES NATURALLY* 372 (1989) (baseball); Weinrib, *Utilitarianism*, *supra* note 23, at 321-22 (golf); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 50-51 (1990) (chess); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 101 (1977) (chess); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 8-9 (1991) (baseball).

the substituted position must hit for himself. The DH rule is in force in the American League but not in the National League.

The baseball purist, the formalist of the world of sport, believes that the end of baseball is baseball. She typically dislikes the DH rule (as well as artificial turf, aluminum bats, and large colorful scoreboards). The DH rule, she believes, is inconsistent with one of the central features of baseball, that every player must take both a defensive and an offensive role. She deplors the simplification of the manager's job caused by the DH rule, which removes problems such as whether to double switch on a pitching change and when to walk the opposition's number eight hitter. She fears that the DH rule is one in a series of popularizing rule changes that will ultimately make baseball incoherent and unrecognizable.

The baseball realist, who believes that the real purpose of baseball is to sell beer, argues that the DH rule was adopted to increase the popularity of baseball. Any consequent increase in popularity would then be sufficient justification for the rule. He may also defend it with the observations that it creates more offense, faces pitchers with a more consistent challenge, removes the absurdity of frequent walks to the number eight hitter, and provides employment opportunities for older players. He will not fail to point out, however, that all of these factors do contribute to the popularity, the revenue, and ultimately the survival of the game. He knows that baseball, like other human activities, must adapt itself to modern social reality, and regards the abandonment of tradition represented by the DH rule as a small price to pay.

The formalist's insight that the end of baseball is baseball does not solve the problem of how we know what baseball is. Whether the DH disrupts the coherence of the game can only be decided if we know what the essential features of baseball are. Is the principle that every player must have a defensive and an offensive role more important than the continual challenge to the defensive team to retain control of the ball, a challenge which is reduced when pitchers hit? Is the weakness of pitchers' hitting not itself a contingent consequence of modern specialization, which has improved the game in virtually every respect? Are the fans themselves just a source of revenue for a non-instrumental activity, or is their presence and participation at every game an essential aspect of what baseball is? The formalist cannot answer these questions without some attention to the concerns of the realist, thus baseball formalism depends on baseball realism.

The converse is also true. The realist must concede at a minimum that the survival and popularity of the DH rule depends on how well it coheres with the other features of baseball. The arguments that the DH presents a greater challenge to pitchers and prevents excessive walks both appeal to an internal

conception of what baseball is, that baseball is about the control of the ball and the patterned disruption of that control. To be sure, the realist may add that baseball must maintain some connection with its own history to remain a popular and profitable business, but this proviso does not entirely remove his arguments from the non-instrumental realm. Thus, baseball realism has little to say without baseball formalism.

If realism and formalism are related in the manner that I have suggested, their antagonism should be seen as fruitful rather than mutually exclusive. The possibility of a more systematic reconciliation of these two tendencies is a subject for future research.